No. 47718-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

BATTLE GROUND CINEMA, LLC, a Washington limited liability company,

Plaintiff-Appellant,

v.

ROBERT BERNHARDT and KAREN BERNHARDT, a married couple; CHARLES MULLIGAN, an individual; SAMUEL WALKER and SHELLEY WALKER, as Trustees of the WALKER FAMILY TRUST, a California trust; CHRISTOPHER WALKER and LARA EVANS-WALKER, a married couple; and SAMUEL WALKER, as Trustee of the JTW TRUST, a California trust,

Defendants-Respondents.

SAMUEL WALKER AND SHELLEY WALKER, as trustees of the WALKER FAMILY TRUST, a California trust; CHRISTOPHER AND LAURA EVANS-WALKER, a married couple; JOSEPH WALKER, as trustee of the JTW TRUST, a California trust; ROBERT AND KAREN BERNHARDT, a married couple; and CHARLES MULLIGAN, an individual,

Plaintiffs-Respondents,

v.

ELIE G. KASSAB, an individual; THE GARDNER CENTER, LLC, a Washington limited liability company; and BATTLE GROUND CINEMA, LLC, a Washington limited liability company,

Defendants-Appellants.

OPENING BRIEF OF APPELLANTS

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Assignments of Error

1. The Superior Court erred in granting Walker Parties' motion for summary judgment in the Lease Case (case no. 12-2-04501-5) where genuine issues of material fact existed on Battle Ground Cinema's two claims that Walker Parties breached the lease's requirement to maintain the common areas of the shopping center.

2. The Superior Court erred in awarding to the prevailing parties $1,562,704.52 in attorney fees and $242,245.09 in expenses on simple claims for declaratory judgment and fraud based on a questioned document and breach of lease, where the prevailing parties did not win any damages and nine of their 11 claims for relief were dismissed. This assignment of error challenges findings of fact[1] 1, 2, 4, A, B, C, D, and E; and conclusions of law C, D, E1, E2, E3, E 4, E5, E6, E6a, E6b, E6c, E6d, E6e, E6f and 7.

a. The Superior Court's findings and conclusions are not supported by evidence and reasoning.

b. The Superior Court failed to evaluate Walker Parties' failure to exercise billing judgment and limit their legal effort in

[1] The findings of fact are in the opinion and order on fees (CP 9574-9603).

proportion to the simplicity of the legal and factual issues. This sub-assignment of error challenges findings of fact 1, A, B, C, D and E; and conclusions of law C, E1, E2, E3, E6b, E6c, E6d, E6e, E6f and E6g.

c. The Superior Court Failed to Consider the opposing side's fees. This sub-assignment challenges findings of fact 1, 4, E; and conclusions of law C, D, E6, E6b,

d. The Superior Court refused to allow expert Whipple to testify. This assignment of error challenges finding of fact 2, B, C, D, E.

e. The Superior Court refused to consider expert Sand's time and expense analysis. This assignment of error challenges findings of fact 1, 2, B, C, D, E; and conclusions of law C, D, E1, E2, E3, and E6 including all subparts.

f. The Superior Court refused to segregate fees among claims. This assignment of error challenges finding of fact A; and conclusions of law E4 and E5.

g. The Superior Court impermissibly awarded fees for time spent by attorneys representing third parties. This assignment of error challenges conclusion of law E7.

3. The Superior Court erred in awarding fees and expenses under RCW 4.84.185 when one or all of the claims and defenses of BGC Parties were advanced with reasonable cause. This assignment of error and its subparts challenge conclusion of law F and the ultimate conclusion at CP 9603.

a. The Superior Court failed to apply the correct legal standard in awarding RCW 4.84.185 fees without a finding that all of BGC parties' claims and defenses were frivolous.

b. The Superior Court erred in striking the declaration of Ed Gambee offered as evidence of a good faith basis under RCW 4.84.185 for BGC Parties belief that the third page of the guaranty was genuine.

c. The Superior Court erred in determining that there was no reasonable basis for BGC Parties theory that the third page of the guaranty was genuine.

d. The Superior Court erred in finding there had been fraud or "forgery" without a trial or evidentiary hearing.

e. The Superior Court erred in failing to find that an award of fees under RCW 4.84.185 was mooted by its award under the lease and guaranty.

4. The crime-fraud exception to the attorney-client privilege, will no longer be an issue on remand.

Statement of the Case

A. History and Posture of the Case

These are consolidated business litigation cases involving two disputes: (1) whether the duration of Elie Kassab's personal guaranty of Battle Ground Cinema's lease was 10 years or 25, and (2) whether the landlord Walker Parties[2] breached the lease by failing to maintain common areas of the small shopping center. All claims in both cases were resolved by the Superior Court on motions for summary judgment or by voluntary dismissal. The Superior Court awarded $1,804,949.59 in attorney fees and litigation expenses to the Respondents. The Superior Court's opinion and order on fees is the appendix to this brief. It is cited by CP number.

The Superior Court granted Walker Parties' motions for summary judgment and denied BGC Parties'[3] motions for summary

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[2] The term Walker Parties refers to all respondents.

[3] In this brief, Kassab and the two LLC's are called BGC Parties as they are designated in the Judgment. In the Superior Court they were sometimes called Kassab Parties and sometimes BGC Parties. Battle Ground Cinema, LLC is referred to as the Cinema.

judgment. BGC Parties appeal the Superior Court's grant of summary judgment in favor of Walker Parties on the breach of lease claim and appeal issues affecting the amount of the award of attorneys' fees and expenses. BGC Parties do not appeal the Superior Court's summary judgment ruling that Walker Parties' are entitled to a declaratory judgment that the personal guaranty was for 25 years and not 10.[4] Walker Parties have not cross-appealed.

B. Facts Relevant to the Merits of the Claims[5]

Elie Kassab was the principal of The Gardner Center, LLC, and Battle Ground Cinema, LLC (CP 3671). Gardner Center, LLC developed, and built the Gardner Center shopping center in Battle Ground, Washington (CP 3671). Battle Ground Cinema leased the theater building in the shopping center (CP 3798, 3802).

Walker Parties, a group of investors, purchased the shopping center for $12.7 million under a purchase and sale agreement ("PSA") (CP 3671, 3717). Under the agreement, Gardner Center, LLC furnished Walker Parties, both directly and indirectly through

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[4] Despite the existence of genuine issues on material fact on this claim, BGC Parties believe the cost of continuing this aspect of the litigation is not justified in the absence of damages.

[5] As the opponents of summary judgment, BGC Parties are entitled to the view of the facts most favorable to them. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 226, 770 P .2d 182 (1989).

Walker Parties' real estate agent, the documents requested by Walker Parties (CP 3671 ¶ 5). This included the leases of the tenants in the shopping center (CP 3742). The Walker Parties signed a "contingency removal" (CP 3671 ¶ 5; 3746-3755) signifying that Gardner Center, LLC had provided all of the due diligence materials requested (CP 3742-3755).

One of the documents provided to Walker Parties during the due diligence period was the 25-year lease between Battle Ground Cinema, LLC and Gardner Center, LLC, which contained a personal guaranty from Kassab (CP 3756-3795). Some copies of the lease and guaranty in the summary judgment record contain a third page of the guaranty which limits the duration of the personal guaranty to ten years; some do not (compare, e.g., CP 3756-3795 with CP 3051-3089). One of the issues before the Superior Court was whether the third page of the guaranty was genuine or not. Another was whether the third page had been provided to Walker Parties at the time they purchased the shopping center. If it was genuine and if the third page was provided to Walker Parties during due diligence, then the guaranty was limited to 10 years (CP 3793-3795). If it was not genuine, or if it was not provided, the duration

of the guaranty was the full 25-year term of the lease (CP 3088-3089).

In late 2011 and early 2012, about six years after Walker Parties purchased the shopping center, issues developed between the Cinema and its now landlord, Walker Parties (CP 3674 ¶¶ 16-17):

- The Mill Creek Pub opened adjacent to the Cinema and began mishandling its garbage which was supposed to be deposited in containers in a garbage corral it shared with the Cinema (CP 3674 ¶¶ 14-17). The Cinema management, some of its patrons, other tenants' employees and patrons, Gardner Center management, and even the waste management company complained that the garbage was leaking used cooking oil (on which a patron of the theater slipped and fell) and was left uncovered, drawing mice, rats, maggots and even garter snakes (CP 4083-4224, 3673-3674 ¶¶ 14-17). This was documented with photographs and in writing (*Id.*).
- Another issue was the Cinema's request for a temporary rent reduction (CP 3403, 4227, 4590, 4592).
- Another issue was the Cinema's concern that the shopping center common areas were not being maintained and kept in

repair (CP 3674-3675 ¶¶ 18-19), which had created unsafe and unsightly conditions. These included a cracking, failing sidewalk outside the emergency exits of the theater (CP 3674-3675 ¶¶ 18-19).

As a result of Walker Parties' failures to keep the common areas clean and in good repair, the Cinema withheld payment of about $18,000 of the common area maintenance (CAM) charges billed to them by Walker Parties under the terms of the lease (CP 3675, ¶ 21). Despite these issues, the Cinema continued to pay rent, continued to operate and did not close, even temporarily (CP 3672 ¶ 8, 3675, 3676 ¶¶ 21, 25).

Attempts to resolve these issues failed. Kassab gave notice that the Cinema would terminate the lease and vacate the building, hoping to force a meaningful dialogue (CP 4228-4236 is the termination notice citing maintenance and repair, enclosing photographs; CP 4227 email from Respondent Bernhardt acknowledging repair issues; 3675 ¶ 19). The Cinema did not follow through on that threat because the Walker Parties did begin the serious dialogue (CP 3675 ¶ 19; 4597). The two sides also disagreed on the duration of Kassab's personal guaranty of the

theater lease and whether the third page of the guaranty limiting it to 10 years had been provided during due diligence.

Instead of terminating the lease, the Cinema filed the first of these cases against Walker Parties, asserting claims for breach of the lease based on the failure to maintain the common areas (CP 1993).

Walker parties then filed suit against BGC Parties alleging breach of the lease and eight claims for fraud and misrepresentation all based on the theory that the guaranty's third page had been withheld during due diligence (CP 1).[6] Walker Parties also alleged a claim for a declaratory judgment that the third page of the lease was invalid (CP 11). The complaint did not allege that the guaranty's third page was a recent fabrication (CP 2-12). By the time the second amended complaint was filed, the declaratory judgment and breach claims included the recent fabrication allegation and a ninth misrepresentation claim based on alleged withholding the third page during due diligence was added (CP 1802-1813).

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[6] The first case is referred to as the Lease Case and the second is called the Guaranty Case in the Superior Court and in this brief.

The nine misrepresentation and fraud claims were all based on the theory that the third page had been withheld during due diligence at the time of purchase of the shopping center (CP 1808-1812). The declaratory judgment claim (Claim 1) and the breach claim (Claim 2) were based on the theory that the third page was fabricated and asserted to support the Cinema's threat to terminate the lease (CP 1806-1807).

C. Facts Relevant to Attorney's Fees

All claims were resolved on motions for summary judgment or by voluntary dismissal, without a trial. Nevertheless, Walker Parties claimed $1,532,704.50 in attorney fees. BGC Parties incurred $846,370.31[7] (CP 9060-9063, 9434-9436, 9450, Ex. 5 (also marked 106).

Walker Parties' attorneys expended 6,318.45 hours in this case; BGC Parties' attorneys expended 2,873.3 hours (12-3-15 RP 81; Ex. 5, p. 1).[8] Walker Parties attorneys' hours were more than double (220 percent) BCG Parties' attorneys' hours.

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[7] After reduction by fee arbitration (Ex. 5, p. 1, 12-3-15 RP 77-78).

[8] One of BGC Parties' primary attorneys had a much higher hourly rate than the other primary attorneys on either side, resulting in proportionally more fees per hour expended by the BGC attorneys.

Walker Parties claimed $242,245.09 in litigation expenses, including $118,195.34 to Epiq for electronic document management expense (CP 8368, 8852, 9063). Walker Parties issued 30 discovery subpoenas to third parties (CP 7985). Walker Parties took 19 depositions (CP 7985-7986). All of them were videotaped, even the records depositions (CP 8712, 8852-8853). 762 hours were claimed for preparing for and taking depositions of third-party witnesses (CP 9391-9392, 9455)

Walker Parties hired three document experts (Green, Hicks and Waugh), a linguistics expert, and a handwriting expert to analyze one page, one letter and some other unspecified documents. (CP 9194-9195, ¶7). The Walker Parties hired five damages experts, (CP 9195-9196, ¶8). Walker Parties also hired a property management expert and a garbage expert, bringing the total number of experts hired prior to the attorney fee stage of this case to twelve (CP 7972, 7986-7987, 8850-8858). Walker Parties hired Tsongas Litigation Consulting (CP 8368, 7986-7987). Walker parties relied on only three of these experts in their summary judgment filings (CP 3595-3612, 5615-5666, 4797-4799).[9]

[9] Only one of the expert submissions on summary judgment constituted admissible evidence. Appraiser Palmer's declaration (CP 4797-4799) stated that he had not finished his appraisal and submitted no support for his conclusion of

Walker parties moved to invoke the crime-fraud exception to the attorney client privilege by "motion for in camera review" which requested discovery of BGC attorneys' communications by enforcing subpoenas and requiring depositions (CP 6664-6900). Walker Parties' motion claimed they had already obtained "overwhelming" evidence of forgery and fraud (CP 6681-6682, 6685, 6689) but still requested the extraordinary relief of "application of the crime-fraud exception to the attorney-client privilege" (CP 6665). The discovery master granted the motion for in camera review of attorney client communication, but deferred implementation of the order until after the then pending summary judgment motions were decided (CP 7906-7907). The Superior Court's grant of summary judgment on all claims, was deemed to have mooted the crime-fraud motion (CP 7906-7907).

The Superior Court awarded $1,804,949.61, the entire amount claimed, against BGC Parties (CP 9573, 9670-9672). This included an award of $30,000 for future fees (CP 9579).

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an unspecified diminution in value (CP 4799, ¶ 5). Hicks, a document expert, did not submit a declaration. Instead, attorney Olsen submitted two letters prepared by Hicks as part of Olsen's declaration (CP 4807, ¶ 63 & ¶ 64, CP 5615-5666).

Argument

A. Genuine Issues of Material Fact Precluded Summary Judgment on The Cinema's Claim for Breach of the Lease[10]

The Superior Court granted (CP 7917-7918) Walker Parties' motion (CP 3662-3666) for summary judgment on the Cinema's claims for failure to maintain and repair the common areas. The tenants of the shopping center, including the Cinema, paid the landlord Walker Parties common area maintenance (CAM) fees (CP 3673 ¶ 3.2). Nevertheless, Walker Parties argued that they had no duty under the lease to maintain the common areas (CP 3662).

In response to the motion, the Cinema presented evidence in the summary judgment record that Walker Parties did not maintain the common areas of the shopping center and allowed unsafe and unsightly conditions to exist:

- Photographs of maintenance problems and garbage with maggots, leaking oil, and other problems (CP 4601-4602 ¶¶ 15, 18, 19, 26 referencing CP 4083, 4114-4121, 4122, 4142-4174);

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[10] Case No. 12-2-04501-5.

- Evidence of complaints about the conditions around the theater (CP 4601-4602 ¶¶ 16, 17, 20-25, 27, 29-32 referencing CP 4110, 4111, 4125-4141, 4174, 4215-4223);
- A city inspector's report on the unsafe sidewalk outside the emergency exits (CP 4602 ¶ 28 referencing CP 4176-4214);
- The declaration of Elie Kassab enumerating the failures to adequately repair and maintain the common areas (CP 4640-4642);
- A copy of the common area maintenance agreement to which Walker Parties were signatories, showing their plan to meet their obligation to maintain the common areas of the Gardner Center (CP 4691-4692).
- A copy of the covenants, conditions and restrictions (CCR's) for the Gardner Center defining common areas (CP 4665), operating expenses (CP 4666), tenants' obligation limited to their rented spaces (CP 4673), and the obligation to maintain the common area facilities (CP 4674).

Despite that evidence, the Superior Court granted Walker Parties' motion for summary judgment and dismissed both of the Cinema's claims in the lease case.

A summary judgment ruling is reviewed de novo on appeal and requires the same inquiry as in the trial court. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 140, 331 P.3d 40 (2014). When deciding a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 226, 770 P .2d 182 (1989). The nonmoving party must show the existence of a material question of fact for each essential element which it bears the burden of proof at trial. *Id.* at 225. Summary judgment may be granted only if it appears in the record that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). Summary judgment may be granted only if, on the basis of the summary judgment record, "reasonable minds could reach but one conclusion." *SentinelC3,* 181 Wn.2d at 140.

The evidence of failure to maintain the shopping center common areas gave rise to genuine issues of material fact on the issue of breach. The evidence of the course of dealing and conduct of the Walker Parties presented genuine issues of material fact on the issue of their duty to maintain the common areas.

The law is no help to Walker Parties either. There is no reasonable construction of section 3.2(1)[11] of the lease that allows an inference that the landlord Walker Parties are not required to earn the money they were being paid to maintain the common areas. This was in the context of the common area maintenance agreement (CP 4691-4692) and the CCR's (CP 4665, 4674) requiring Walker Parties to maintain the common areas.

Common law does not relieve Walker Parties of their duty. On the contrary, "A landlord has a duty to maintain, control and preserve retained portions of the premises subject to a leasehold in a manner rendering the demised premises adequate for the tenant's use and safe occupancy by both the tenant and his invitees." *Cherberg v. Peoples National Bank of Washington*, 88 Wn.2d 595, 601, 564 P.2d 1137 (1977). "...[A] landlord is presumed to retain control over all common areas of its leased premises and is responsible for maintaining those areas." *Resident Action Council v. Seattle Housing Authority*, 162 Wn.2d 773, 789, 174 P.3d 84 (2008).

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[11] "In addition to the minimum monthly rent, Tenants shall pay as additional rent its share of all operating expenses for the Retail Center. As used herein "operating expenses" shall mean all costs of administrations, operation, management, maintenance, repair and replacement of the common areas of the Retail Center...." (CP 3673).

Walker Parties argued on summary judgment that sub-section 6.5 of the lease waived the breach of contract claims (CP 3644, 3666). Sub-section 6.5 is part of Section 6 of the lease (CP 3765-3766). Section 6 is a standard commercial lease provision requiring insurance and waiving claims of the kind covered by insurance: fire (subsection 6.4) and personal injury and physical damage to property (subsection 6.5). *See generally*, *Millican of Wash. v. Wienker Carpet*, 44 Wn. App. 409, 411, 418, 722 P.2d 861 (1986). The purpose of sub-section 6.5 in the context of section 6, is to ensure that the tenant will carry insurance and to ensure that the landlord is not exposed to uninsured claims for injury and property damage.

Even without considering the insurance context of the lease, subsection 6.5, by its terms, applies only to claims for property damage and personal injury. It does not apply to claims for breach of contract. It did not bar the Cinema's claims for breach of the lease provisions the Cinema was required to pay for.

The Superior Court's grant of summary judgment against The Cinema's claims in the lease case should be reversed.

B. The Attorney Fees and Expenses Awarded Are Excessive

This case is another example of an uncomplicated business dispute blown into an inflated claim for attorney fees. The award of $1,809,949.61 in a case with claims based on breach of a maintenance obligation and a questioned page of a document, with no damages awarded and with no trial, creates a "suspicion of unreasonableness," as it did in *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 156, 859 P. 2d 1210 (1993). In this case, as in Weeks, the disproportionate and unreasonable claim for fees and expenses "demonstrates little, if any, billing judgment." *Id.*

The disproportionate fee award in the absence of damages or a trial requires close scrutiny. "[A] lodestar figure which grossly exceeds the amount involved should suggest a downward adjustment." 122 Wn.2d at 150. The Court in *Weeks* did not remand the fee issue and determined that the hours were "patently unreasonable" and reduced them from 481 to 70. 122 Wn.2d at 152-153.

An appellate court reviews a trial court's fee award for an abuse of discretion. *Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 81, 272 P.3d 827 (2012);[12] *Bowers v. Transamerica Title Ins.*, 100

[12] *Clausen* affirmed an award of $387,558.00 in attorney fees. That case was fully tried to a jury and there had been a prior related proceeding in federal court. 174 Wn.2d at 74-75.

Wn.2d 581, 599, 675 P. 2d 193 (1983); *Berryman v. Metcalf*, 177 Wn. App 644, 658, 312 P.3d 745 (2013), *review denied*, 179 Wn.2d 1026 (2014). "Discretion is abused when the trial court exercises it on untenable grounds or for untenable reasons." *Id.*, citing *Chuong Van Pham v. City of Seattle*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007).[13]

An error of law is an abuse of discretion and is reviewed *de novo*. *State v. Corona*, 164 Wn. App. 76, 78-79, fn 2, 261 P.3d 680 (2011)("Thus, to determine whether the trial court committed an error of law, which is included in the abuse of discretion standard, we review the alleged error of law itself de novo").

"...[T]he trial court abuses its discretion when it takes irrelevant factors into account." *Chuong Van Pham*, 159 Wn.2d at 543]

The fees in this case should have been adjusted downward and should be remanded or reduced based on the factors discussed in this brief.

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[13] In *Chuong Van Pham*, the trial court's award of $297,532.77 in attorney fees was affirmed but remanded to determine if a contingent multiplier should be applied. That case was fully tried to a jury and had a complex pretrial procedural history, involving both federal and state courts, an appeal to the Ninth Circuit, and an interlocutory appeal to the Court of Appeals. 159 Wn.2d 527 at 540.

1. The Superior Court's Findings and Conclusions Are Not Supported by Evidence and Reasoning

Our Supreme Court tells us that an adequate record is necessary to support an award of fees and that "findings of fact and conclusions of law are required to establish such a record." *Mahler v. Szucs*, 135 Wn.2d 398, 435, 966 P.2d 305 (1998). "Courts must take an active role in assessing the reasonableness of fee awards. .... Courts should not simply accept unquestioningly fee affidavits from counsel." 135 Wn.2d at 434-5. "[T]o facilitate review, the findings must do more than give lip service to the word 'reasonable.'" *Berryman,* 177 Wn. App at 658. It follows that, to be sufficient for review, the findings of fact must explain the manner in which the court resolved disputed facts and the conclusions of law must explain the court's reasoning. "... [W]e will exercise our supervisory role to ensure that discretion is exercised on articulable grounds." *Mahler*, 135 Wn.2d at 435.

The Superior Court issued a 33-page opinion and order (CP 9571-9603) containing many findings and conclusions. At first glance the opinion and order may appear adequate. But the findings and conclusions are, with a few minor exceptions, the verbatim regurgitation of Walker Parties' proposed opinion and

order (CP 9343-9379) and are infected with the same lack of evidentiary support and use of imprecise hyperbole[14] as the proposed ones. This is one indication that the Court's analysis may not have been sufficient.

Our appellate courts have provided guidance for a trial court's exercise of its discretion. *Bowers v. Transamerica Title Ins.*, 100 Wn.2d 581, 675 P. 2d 193 (1983) provides step by step guidance for determining attorneys' fees awards, beginning with the lodestar calculation. 100 Wn.2d at 597-601.

The lodestar analysis "begins with the calculation of a lodestar figure."

> The court must limit the lodestar to hours reasonably expended, and should therefore discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time.

100 Wn.2d at 597. Additional guidance is found in *Weeks,* 122 Wn.2d at 149-153. More recent cases articulating this methodology include *Cedar Grove Composting, Inc. v. City of Marysville,* 188

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[14] The use, especially after opinion and order p. 10 (CP 9580), of terms, such as Immense, numerous, countless, massive, multitudes, disastrous, years of transactions, many millions, dozens, bitter resistance, pose the questions, how many, how large and what exactly?

Wn. App. 695, 354 P.3d 249 (2015) and *Miller v. Kenny*,[15] 180 Wn. App. 772, 820-823, 825, 325 P.3d 278 (2014).

The party seeking fees has the burden to prove the fees. *Weeks*, 122 Wn.2d at 151. A court may adjust the requested fee downward by a percentage. *Clausen*, 174 Wn.2d at 82; *Cedar Grove*, 188 Wn. App. at 730-733 (hours reduced by 40 percent where case was straightforward and hours were double those of the other side).

The lodestar is not just rate times hours. It requires a determination of reasonableness. The Superior Court did not conduct the inquiry required, nor did it adequately explain its reasoning.

Much of the opinion and order is based on the perception that Kassab deserved to pay the fees because he defended his

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[15] *Miller* affirmed a fee award of $1,563,803.75 which included a 1.5 multiplier. That case however was fully tried to a jury verdict of $13 million (180 Wn. App. at 788), resulted in a judgment of almost $22 million (180 Wn. App. at 789), involved "difficult and novel issues" (180 Wn. App. at 821), and was "one of the most complex and difficult civil cases ever undertaken in Skagit County. The case took nearly eight years of litigation, a fourteen-day bifurcated jury trial, two previous trips to the Court of Appeals, 70,000 pages of documents, 95 motions, a $25,000 discovery sanction imposed, and 669 entries in the trial court docket. This case was tough." 180 Wn. App. at 825. The instant case had 335 docket entries (134 in the lease case and 201 in the guaranty & consolidated cases), some of which were duplicative because there were two dockets before consolidation. *Miller*, in contrast to this case, is what a million-dollar fee case looks like.

memory. This is labeled "relentless" and "bitter" (CP 9582). The odd use of criminal terminology, such as "forgery" (CP 9582, 9588, 9589, 9602) and "laundered" (CP 9582) suggests the analysis was not objective (CP 9602). This language was combined with exaggeration. For example:

> The Owners set about the daunting task of proving Kassab laundered the third-page of the personal guaranty through his own lawyers, real estate brokers, employees, accountants and others over the course of several years. This effort required a massive legal undertaking. The Owners were required to depose former lawyers, bankers, loan officers, employees, third parties, and nearly anyone associated with Kassab or Battle Ground Cinema, LLC ('Battle Ground'). (CP 9582)

There is no evidence of "laundering" the third page through real estate brokers, employees, accountants and others, whatever that may mean. There certainly was no need to depose "nearly anyone associated with Kassab or Battle Ground Cinema." This hyperbole is not supported by the record. It illustrates the lack of reasoned analysis.

2. Failure to Consider the Absence of Billing Judgment

The Superior Court did not evaluate whether or how billing judgment was exercised, despite BGC Parties' urging that it do so (CP 8632, 8637, 9390, 9393-9394); 12-3-15 RP 97-101). This was a case where the attorneys for the prevailing parties were required

to but failed to exercise billing judgment. *See*, *Weeks*, 122 Wn.2d at 156. Their failure to exercise billing judgment resulted in fees and expenses out of proportion, not merely to the stakes, but to the legal effort actually needed to achieve the result. The result to which they devoted that unnecessary effort was to establish that the third page of the guaranty was not valid.

The term "billing judgment" means exactly what Walker Parties' expert, expert Talmadge, said it does not mean (12-3-15 RP 61-62, 129-130, 133-136). It is more than "no-charging" time. It means using judgment to ensure that the fees are reasonable for the particular case by making cost effective litigation decisions. Billing judgment is figuring out what is the most cost efficient, cost effective way to handle litigation to get to an inexpensive resolution of the dispute (12-3-2015 RP 98-99). *Weeks*, 122 Wn.2d at 156; *Berryman*, 177 Wn. App at 661. expert Talmadge denied that this was the meaning of billing judgment (12-3-2015 RP 61-62, 129-130, 133-136).

Our Supreme Court explained:

> Over a decade ago, the United States Supreme Court exhorted attorneys to exercise "billing judgment" in fees requests so as to avoid a costly second major litigation. *Hensley v. Eckerhart*, 461 U.S. 424, 437, 76 L.Ed.2d 40, 103 S.Ct. 1933 (1983). Unfortunately, this case demonstrates

> that the Court's words have not been uniformly heeded. This case began with an uncomplicated dispute over 120 vacuum cleaners worth less than $20,000. The jurisdictional problems with the Washington case were manifest. Out of these simple facts, Dwight's' attorneys have fashioned a claim for over $200,000 in attorneys fees. As discussed above, a claim for over 10 times the amount in contention, in a run-of-the-mill commercial dispute, certainly gives rise to a suspicion of unreasonableness, and demonstrates little, if any, billing judgment.

Weeks, 122 Wn.2d at 156.

Billing judgment is related to the concept of proportionality in litigation and CR 1's requirement that the civil rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."[16]

In *Weeks*, the unreasonable fees sought were due to the parties having "declared war" on each other. *Weeks*, 122 Wn.2d at 152, fn. 7. In such situations, "Rather than lament the outrageousness of the fees, trial courts should take affirmative action to limit fees ..." *Id.* Here, the trial court did not even lament the $1.5 million in fees sought.

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[16] Billing judgment may be another way of looking at the "result obtained" criterion. *See Wash. State Commc'n Access Project v. Regal Cinemas, Inc.*, 173 Wn. App. 174, 293 P.3d 413 (2013) in which an award of $404,322.76 was affirmed, including a 1.5 multiplier in a case tried to the court after motions for summary judgment, and involved a novel question of law on the application of WLAD to theaters' closed captioning.

Similarly, in *Berryman*, 177 Wn. App. at 661, the court decried the failure to exercise billing judgment by attorneys who claimed almost $292,000 in a case where the damages were in the $35,000 range. The court found it was an abuse of discretion for the trial court to accept 468.55 hours as reasonable for that case. *Id.*

The Superior Court's failure to consider billing judgment allowed an unreasonable and excessive fee award for a routine business contract and tort case. The excessiveness of the fees awarded in this case make *Weeks* and *Berryman* look like petty cash. The Superior Court's failure to consider this factor was an abuse of discretion.

Walker Parties' attorneys treated this case as if it were "bet the firm" litigation (CP 7972-7973). It isn't. No damages were awarded. None were seriously sought. Walker Parties' damages claims based on fraud and misrepresentation were pled in the alternative to their declaratory judgment claim and were dismissed when the declaratory judgment was granted on summary judgment. Walker Parties voluntarily dismissed their remaining damages claims after the summary judgment was granted.

The stakes were not unusually large. The record contains no evidence of an amount of damages.[17] The Cinema continues to pay rent. The lease is not at stake. The actual stakes were the duration of a guaranty of a performing (rent paying) lease, a lease that had performed for years, and a dispute over maintenance of common areas of a small shopping center. There is no evidence that the lease guaranty is likely to be triggered by some default, when the guarantor is the sole owner of the tenant which has never defaulted. The Cinema, was motivated to, and did, continue to succeed. The Walker Parties continued to receive rent and corrected some of the maintenance problems. This is not end-of-the-world stuff.

The Superior Court ignored the evidence (12-3-15 RP 100-110, CP 8707-8710, 8713) of ways in which this case could have been handled more efficiently. The court did not evaluate the suggested alternatives to the excessive litigation such as effective use of discovery tools. The Court refused to consider expert Sand's evidence of excessive hours spent on tasks such as depositions.

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[17] There is argument that at least $5,000,000 was at stake and the Court made that unsupported finding. But we have found no evidence of that number. The only evidence we have found on damages is the inadmissible declaration of Palmer (CP 7497-7499) which only speculates about diminution of value but arrives at no figure.

3. The Superior Court Failed to Consider the Opposing Side's Fees

The Superior Court refused to consider that the fees incurred by the BGC Parties were half those claimed by the Walker Parties (12-3-2015 RP 79-80). That was an abuse of discretion because there is no rational basis for the refusal and because the other side's fees are a factor to be considered in fee litigation. This is true as a matter of law. *Fiore v. PPG Industries, Inc.*, 169 Wn. App. 325, 354-355, 279 P.3d 972 (2012). It is also true as a matter of logic. BGC Parties expert Talmadge[18] agreed that BGC Parties fees should be considered and admitted that he had not seen them (12-3-15 RP 59-61). Expert Talmadge had even chided expert Sands (the BGC Parties' expert) when Sands cited *Cedar Grove, supra.*[19] Talmadge stated:

> The trial judge also reduced the award on an additional percentage basis where Cedar Grove' attorneys billed *double* the amount of hours of the City's trial counsel and those attorneys "loaded up"

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[18] Ironically, Mr. Talmadge in his supplemental declaration said, "It is also noteworthy that the BGC parties' counsel *nowhere* discuss the hours they billed their clients. Their silence certainly suggests that their hours were no less than those spent by the Walkers' counsel on their behalf." (emphasis in original)(CP 9336). Apparently Walker Parties had never provided BGC Parties' billings to their expert (12-3-15 RP 59-60).

[19] Expert Talmadge claimed that *Cedar Grove* was distinguishable from the instant case, in part, due to the fact that the opposing parties' attorney fees in *Cedar Grove* were 50% of the prevailing party's fees. However, expert Talmadge was obviously in error as the same is true here, i.e., the BGC Parties' fees are 50% of the Walker Parties' fees.

> their bills after they prevailed on liability. Nothing like that conduct was present here.

CP 9334, fn. 1 (emphasis in original). Of course, expert Talmadge was incorrect when he claimed that the Walker Parties' fees were not double the BGC Parties' fees.

In *Fiore*, the Court held: "[A] comparison of hours and rates charged by opposing counsel is probative of the reasonableness of a request for attorney fees by prevailing counsel." [collecting cases] *Fiore*, 169 Wn. App. at 354-355.

> Where a defendant, challenging a plaintiff's attorney fee petition, contends that the request includes unnecessary or excessive charges, the amount of time expended by defense counsel in performing the same task 'may well be the best measure of what amount of time is reasonable for this task.

Id.

The Superior Court expressed skepticism about the evidence of the BGC Parties fees (12-3-15 RP 79-80 "I'm not finding a lot of relevance to the Garvey Schubert fees") and did not mention in the opinion and order that the BGC Parties fees were half of those sought by Walker Parties (CP 9571-9603).

The Superior Court abused its discretion in failing to evaluate the significant difference in fees incurred on each side. On remand

the Superior Court should be instructed to consider the fees of the BGC Parties, especially in light of their having changed lead counsel twice during the course of the litigation.

4. The Superior Court Refused to Allow Expert Whipple to Testify

The Superior Court did not allow expert Whipple to testify (12-3-15 RP 33-34; CP 9576). BGC Parties put on a summary of his testimony as an offer of proof (12-3-15 RP 117-128). Expert Whipple, unlike either side's other experts, had actually reviewed the case file, including the subpoenas, depositions, discovery and motions (12-3-15 RP 28-29, 32-33, 118-119, 125-126). Unlike Walker Parties' expert Talmadge, he had thoroughly studied the files and billings of the lead attorneys for BGC Parties because he had testified in a fee arbitration of that firm's fees (12-3-15 RP 119-120, 122-124, 126). He was able to compare the time billed for each deposition to the deposition transcript ((12-3-15 RP 124-125).

To determine a reasonable fee, the court is to consider the testimony of experts and their declarations. *Progressive Animal Welfare Soc. v. University of Washington*, 54 Wn. App. 180, 186, 773 P.2d 114 (1989)("Indeed, trial courts routinely consider new evidence in attorney fee hearings: fee affidavits are normally

required, and testimony concerning the reasonableness of the requested fee award may be heard"); *Bowers v. Transamerica Title Ins.*, 100 Wn.2d 581, 594, 599-600, 675 P. 2d 193 (1983)(several experts testified at the fee hearing); *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 145, 859 P. 2d 1210 (1993)(three experts testified at fee hearing).

Expert Whipple had valuable evidence based on a foundation that no other expert had. In fact, the Superior Court disregarded the testimony of expert Sand precisely because he had not performed the in-depth review of the case file that expert Whipple had (CP 9575 Sand "has not fully reviewed the record"). It was an abuse of discretion not to let Whipple testify without some principled reason for excluding him. On remand he should be allowed to testify to provide the detail that could not be provided in an offer of proof.[20]

5. The Superior Court Failed to Consider Expert Sand's Time and Expense Analysis

A trial court, in determining a fee award, should take into account the testimony of experts as to the reasonableness of the hours claimed. *Weeks*, 122 Wn.2d at 152. *Weeks* faulted the trial court for awarding fees "with no examination of the actual

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[20] The Court pressed to shorten the presentation and limited it to a summary (12-3-15 RP 34-35, 116-118, 124-125).

reasonableness of these hours." *Id.* But the Court in this case refused to consider the only analysis before it of the reasonableness of the hours (CP 8707-8895, 12-3-15 RP 67-111). That was the analysis of expert Tom Sand.

"The amount actually spent by the plaintiff's attorney may be relevant, but it is in no way dispositive." *Nordstrom, Inc. v.* Tampourlos, 107 Wn.2d 735, 744, 733 P.2d 208 (1987). If it were dispositive, there would be no way to avoid awarding excessive and unproductive time. That is why courts must take an active role in evaluating the reasonableness of the time spent. *Mahler, supra* 135 Wn.2d at 434-5.

To satisfy this requirement in this case the Superior Court was required to evaluate the detailed evidence provided by expert Thomas Sand. This evidence was the only such evidence before the Court.

The Superior Court instead stated it would not evaluate the hours and time records and complained that expert Sand's spreadsheet detail would not be considered because it would be an "unduly burdensome exercise" (CP 9596). The Court reiterated its refusal to review expert Sand's spreadsheets at CP 9597, 9598 and

9599. But expert Sand had done that analysis and summarized his findings in this table (CP 8714):

CATEGORY	QUESTIONABLE HOURS	VALUE OF QUESTIONABLE HOURS
Administrative Tasks	417.35	$71,438
Petition for Attorney Fees Time	130.46	$28,403
Billing Errors	11.20	$2,912
Duplicative Efforts	453.80	$86,024
Excessive Time	318.85	$66,034
Intra-office Communications	56.30	$12,563
Paralegal Tasks (billed by attorneys)	400.70	$105,589
Procedural Legal Research	26.00	$5,508
Redacted Hours	1,264.72	$257,000
Vendor Communications	39.00	$8,196
SUBTOTAL	**3,118.38**	**$643,667**
Excessive Discovery and Motion Practice		$200,000
TOTAL FEE ADJUSTMENT		**$843,667**

The detail in the spreadsheet was there to back up the summary and allow the court to verify it. It was an abuse of discretion to refuse to evaluate the data and opinions based on it.

Expert Talmadge's declarations and testimony contained no such analysis, but his opinions were accepted by the Court. This discrepancy is not explained. In the absence of analysis, expert Talmadge's opinions are mere conclusions. His declarations are mostly discussions of the legal criteria for fee awards, not analysis of the hours spent on various tasks. His first declaration (CP 8002-8035) consists of twelve paragraphs. Of these, three express his bare conclusion that the rates, hours and costs are reasonable citing legal authority, not factual analysis. The exhibits are an article he wrote and his resume. Nowhere is there any analysis of the hours spent or costs incurred. There is no discussion of the volume of and duplication in the record (compare CP 8704).

Expert Talmadge's supplemental declaration (CP 9333-9337) consists of 7 paragraphs of legal argument, a one-sentence bare conclusory opinion, and 1 paragraph which erroneously speculated that BGC Parties' attorneys must have spent no less time than the Walker Parties' counsel, even though he had not been shown those

billings (12-3-15 RP 59-60). The Superior Court refused to limit consideration of this inadmissible declaration (12-3-15 RP 48-49).

Expert Talmadge's testimony also contained no analysis of the hours spent, but he attempted to critique expert Sand without having performed the same analysis himself (12-3-15 RP 53-54). Expert Talmadge's testimony was evasive and argumentative (12-3-15 RP 51-54, 56, 60, 134) prompting the judge to admonish him to "answer the question and not testify as to information you would like to get on the record" (12-3-15 RP 134-135).

The Superior Court failed to note any of these deficiencies or explain why it preferred the expert opinion expressed without analysis to that of expert Sand after considerable analysis.

Expert Sand's declaration, in contrast to Walker Parties' expert, undertook the work of detailed analysis of the time entries. He separated the time entries into categories and totaled the time in each category and has provided detailed data and spreadsheets. (CP 8723-8848). Expert Sand's analysis and the data which support it provide the Court an evidentiary basis for making the determination of reasonableness. Expert Sand is impressively qualified specifically to perform this analysis. He has 35 years of experience in business litigation and litigating fee disputes. His

practice is focused on business litigation, both trial work, and to a lesser extent appellate work; he has successfully tried more than 100 jury trials and handled hundreds of contested evidentiary arbitrations. (CP 8702-8703 & 8717-8721).

Expert Sand also discounted time entries which were so redacted he could not evaluate them. While it may be desirable to redact entries at times, those entries cannot support a fee award without in camera review or some mechanism to evaluate them. *See, 224 Westlake LLC v Engstrom Properties, LLC*, 169 Wn. App. 700, 281 P.3d 693, 712 (2012).[21]

The Superior Court rejected (CP 9575) expert Sand's testimony and asserted his testimony lacked "credibility" because he had only a "general understanding"[22] of the underlying facts and procedural background of the case and had not reviewed the entire case file. But Walker Parties expert Talmadge also disclaimed detailed review[23] of the entire case file and agreed that it was not necessary

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[21] *224 Westlake* awarded fees of $110,000 in a more complicated case factually and legally than this after summary judgment proceeding and then a bench trial and damages awarded of $1,036,000. Also, Washington Reporter page cites are unavailable, so the Pacific Report page cites were used.

[22] Sand had reviewed the subpoenas, the substantive papers, the pleadings, summary judgment materials and had consulted other experts, as well as reviewing all the time entries (12-3-15 RP 92, 96; CP 8703-8704, 8706).

[23] Talmadge stated, "I had reviewed what I thought were the pertinent documents and did not believe, in light of my opinion, that I needed to examine each and every aspect of how the litigation was conducted to arrive at a

(12-3-15 RP 51, 53). This was not a rational basis on which to reject the work of expert Sand while accepting the similarly based but much less thorough opinion of expert Talmadge.

The Superior Court did not consider expert Sand's analysis of the $236,081.22 in expenses claimed by the Walker parties. Of this amount, $118,195.34 was paid to Epiq for forensic computer work and electronic document management. The Court did not evaluate expert Sand's testimony (CP 8707 ¶ 15, 8712 ¶ 25;12-3-15 RP 106-108) on the excessive time and money spent on electronic document discovery and management.

The Superior also failed to consider expert Sand's specific analysis (CP 8712 ¶ 25) of the expenses claimed by Walker Parties. Expert Sand's testimony also addressed the expenses (12-3-15 RP 100, 103, 106-108). The Court did not evaluate expert Sand's opinion at CP 8710 that the following expenses were excessive:

- Copies Services / Copies (in-house): $16,942.94
- Deposition Costs: $35,218.64
- Electronic Document Management Fees: $118,195.34
- Expert Fees: $36,208.25
- Hand Deliveries: $2,442.89

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conclusion." (12-3-2015 RP 51-52). "I don't think an expert needs to go through each and every discovery motion, each and every response, each and every – you know, each and every submission to the court to – arrive at a conclusion about the reasonableness of the fee." (12-3-2015 RP 53-54).

- Legal Research (Westlaw/West-Thomson) Charges: $4,846.88
- Process Service Fees: 3,134.15
- Subpoena Fees: $1,518.65

The Superior Court gave no rationale to explain why it was reasonable to incur the expense to videotape all the depositions, even the records depositions, in the face of testimony that this is not reasonable (12-3-15 RP 57, 102-103).

The Superior Court failed to give a reasoned opinion justifying its award of fees paid to and time spent with twelve experts and consultants in a case of this type. The Court did not explain its rejection of expert Sand's opinion that jury consultants are not appropriate in this type of case (12-3-15 RP 105-106) or his opinion that one or two experts should have sufficed (CP 8713; (12-3-15 RP 104-105).

The categorical rejection of expert Sand's thorough work-up and well-founded thoughtful opinions without a finding of error or inaccuracy and without an adequate explanation was an abuse of discretion. On remand, the Superior Court should be instructed to evaluate the data and opinions on their merits.

6. The Superior Court Refused to Segregate Fees Among Claims

Walker Parties' damages claims in Case No. 12-2-04713-1 (Guaranty Case) were dismissed. No damages were awarded on any claims. The fees and expenses, including the fees charged by damages experts, associated with the unsuccessful damages claims should have been disallowed.

In Case No. 12-2-04501-5 (Lease Case) The counterclaims (breach – CAM charges, Guaranty of CAM charges) were dismissed voluntarily after summary judgment. Time spent on these claims cannot be awarded because Walker Parties did not prevail on those claims.

If this Court reverses the summary judgment on BGC Parties breach of lease claims, the award (CP 9579) of $214,068.50 fees and $3,163.87 in expenses attributable to the Lease Case must be reversed.

The Superior Court erred in including fees for dismissed claims in the award.

7. The Superior Court Impermissibly Awarded Fees for Time Spent by Attorneys Representing Third Parties

Attorney fees can be awarded under the attorney fee provisions applicable in this case only to a prevailing party to the contracts

(CP 3772, section 16.7). It should go without saying that fees cannot be awarded to an entity that is not a party to the case. The concept of fees to third parties was so foreign that BGC Parties' expert Talmadge did not understand it when asked by BGC Parties' counsel (12-3-15 RP 131-132).

Nevertheless, the Superior Court awarded (CP 9599-9600) fees of $102,131 (CP 9314) incurred by law firms representing the deponents from Norris Beggs & Simpson, Coldwell Banker and IQ Credit Union (*Id.*), none of which were parties to the contract or parties to this case and none of which prevailed on anything. There is no authority for these awards and they should be reversed.

C. RCW 4.84.185 Is Not a Valid Basis for the Fees Awarded

1. The Superior Court Did Not Find that All BGC Parties' Claims and Defenses Were Frivolous

To trigger the RCW 4.84.185 sanction, an action must be frivolous in its entirety. *Tiger Oil Corp. v. Dep't of Licensing*, 88 Wn. App. 925, 938, 946 P.2d 1235 (1997). "Simply bringing a frivolous claim is not enough, there must be evidence of an intentionally frivolous claim brought for the purpose of harassment," citing *Rogerson Hiller Corp. v. Port*, 96 Wn. App. 918, 982 P. 2d 131, (1999) and *Wright v. Dave Johnson Ins. Inc.*, 167 Wn. App. 758,

784, 275 P.3d 339, 354 (2012). But, *Tiger Oil* goes on to say, "if any one of the claims asserted was not frivolous, then the action is not frivolous." 88 Wn. App. at 938, citing *Biggs v. Vail*, 119 Wn.2d 129, 137, 830 P.2d 350 (1992). *Biggs* explicitly says that a court is not free to go through a lawsuit and find frivolous claims and award fees on such claims. 119 Wn.2d at 136.

The Superior Court did not apply this standard or make any finding that each claim and defense asserted by BGC Parties was frivolous. Instead, the Court ruled:

> "... [T]hat the gravamen of the entire action in both the Guaranty Case and Lease Case involved the third-page of the Guaranty. Every claim and defense was specifically intertwined and connected with the legitimacy of the third-page of the Guaranty. And once Kassab successfully consolidated the Guaranty Case and Lease Case, Kassab inescapably made the third-page of the Guaranty the central issue in the entire case.

(CP 9602). The Court then decried Kassab's defense of his memory (*Id.*). The Court did not explain what the consolidation of the Lease Case with the Guaranty case had to do with the third page of the guaranty. There is no claim or defense involving the third page of the guaranty asserted by BGC Parties in the lease case.

The evidence supporting Kassab's memory is discussed in the sections of this brief just below. But Kassab also asserted other defenses which were not frivolous. These included that some or all of Walker Parties' claims were barred because they suffered no damages (CP 1947), supported by the evidence that there had been no unpaid rent, the cinema continued to operate in the shopping center and there was no default triggering the guaranty. This defense ultimately proved true when Walker Parties did not pursue their claims for damages and they were dismissed. BGC Parties also alleged appropriate and routine admissions and denials (CP 1944-1946).

Neither was BGC's claim for breach of the lease by failure to maintain the common areas frivolous.

BGC Parties' summary judgment arguments based on contract construction and common law duty to maintain common areas are also not frivolous (CP 4590-4597). In fact, they are correct and are re-asserted here under assignment of error no. 1. BGC Parties' arguments at CP 4590-4597 in response to Walker Parties motion for summary judgment are consistent with the intent and language of the lease and are not frivolous. They are reasoned arguments based on cases and the language of the lease, regardless of

whether or not they were successful. BGC Parties' breach of lease claim is not frivolous.

If any claim or defense in a case is not frivolous, then RCW 4.84.185 does not apply. *Biggs*, 119 Wn.2d at 136-137; *Tiger Oil*, 88 Wn. App. at 938. The Superior Court erred in awarding fees under this statute.

2. The Gambee Declaration Was Admissible to Show Reasonable Belief

The Superior Court, over the objection of BCG Parties, struck the Declaration of Ed Gambee during the post judgment fee proceeding (CP 9050-9051, 9576).[24] Gambee, one of Kassab's loan brokers with whom he had a long business relationship, remembers that the third page was included in the documents at the time of the financing of the Gardner Center project (CP 8648). The purpose of the Gambee declaration was not, as Walker Parties argued, to establish that the third page was genuine. The Gambee declaration was offered in response to Walker Parties' motion for fees under RCW 4.84.185 (CP 8642-8644). Its purpose was to show that BGC Parties had a reasonable and not frivolous basis for

[24] Gambee knows Kassab to be "a respected and reliable business man who has been associated with much of the renewal and development of downtown Vancouver. He has proven to be capable of obtaining this kind of financing and furnishing a product of high quality, desirable to investors" (CP 8648).

their belief that the third page was genuine and existed at the time of the sale of the shopping center (*Id.*).

To be frivolous, Kassab's belief in the genuineness of the third page of the guaranty, must be "without reasonable cause." *See*, *Biggs*, 119 Wn.2d at 136. Evidence that Kassab's memory of the third page was shared by one of his mortgage brokers on the Gardner Center is relevant to whether there was reasonable cause for Kassab's assertions. Gambee's declaration was attached as Exhibit 1 to BCG Parties response to the motion for attorney fees (CP 8646-8688). Gambee testified, "The guarantee was limited to 10 years and consisted of the three pages shown at pages 38, 39 and 40 of Exhibit A to this declaration. I personally put the lease and the guarantee in a binder along with the other documents necessary for obtaining financing and gave it to Kassab." (CP 8648). This testimony tends to make it more likely that Kassab's belief had a reasonable basis.

The declaration was admissible in a fee proceeding under RCW 4.84.185; *Progressive Animal Welfare Soc.*, 54 Wn. App. at 186. The Superior Court erred in striking it. If the case is remanded for a determination on RCW 4.84.185 fees, the Superior Court should be instructed to consider the Gambee declaration.

3. BCG Parties Reasonably Believed the Third Page was Genuine[25]

In addition to Gambee's declaration, the reasonableness of Kassab's belief that the third page of the guaranty was genuine is supported by the deposition testimony (CP 4612-4619) of Brooke Pool, an employee of Kassab's company, as discussed in BGC Parties' response to the Walker Parties' motions for summary judgment (CP 4580, 4583-4587) (Pool testified that she believes the full lease was delivered to the Walker Parties). Kassab's belief was also supported by the testimony of the notary, Lana Scott, as discussed in BGC Parties response to the motion for summary judgment (CP 4583-4587) and in Ex. 2 to BGC Parties response to the motion for fees (CP 8697-8698) (Scott testified that her notary stamps were authentic on the third page of the guaranty).

Kassab's declaration (CP 4638-4640) and deposition (CP 4621, 4638-4640) testimony also supports his memory and explains why the third page is missing from some copies of the lease. That testimony was discussed in the response to the Walker Parties' motion for summary judgment (CP 4582-4583, 4585-4586).

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[25] Although we do not appeal the declaratory judgment, there was evidence supporting Kassab's memory of the existence of the third page which should have resulted in a finding that there was a genuine issue of material fact on the legitimacy of the third page.

4. Unproven Assertions of Fraud and "Forgery"

The Superior Court decided this case on summary judgment without any determinations of fact (e.g. CP 9574), it nevertheless asserted that Kassab committed fraud and "forgery"[26] of the third page of the guaranty (CP 9582, 9589, 9602, 9603) and based on that assertion, applied RCW 4.84.185.

The Walker Parties' allegations of fraud and misrepresentation were never the subject of an evidentiary hearing and remained unproven at the time of the fee hearing. Those allegations could not form a basis for imposition of sanctions.

There was evidence that the third page was electronically created as are many documents these days. There was circumstantial evidence that could be interpreted as evidence that the third page was missing from the due diligence documents. But there was no evidence showing who created the third page. Nor was there evidence showing when it was created. There was no determination of fact based on a full evidentiary hearing that the third page was fraudulent or that it was a forgery.

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[26] *See* RCW 9A.60.020 for the legal definition of forgery.

5. The Claim for Fees under RCW 4.84.185 was Moot.

The RCW 4.84.185 remedy, just like the attorney fee award under the lease and guaranty, is limited to "reasonable expenses, including fees of attorneys." In this case, at least, there is no difference between the fees and expenses available under either theory. The loadstar method and the other criteria enunciated by the courts for determining reasonable fees apply to RCW 4.84.185 determinations. *See generally*, *Mahler*, 135 Wn.2d at 433 (courts should follow lodestar method in civil cases; yields a clear record).[27] There was no reason to reach the more extraordinary RCW 4.84.185 remedy as the same relief is available and was awarded under the lease and guaranty.

D. The Order Imposing the Crime-Fraud Exception to the Attorney Client Privilege Has No Application on Remand

Discovery master and former judge Bennett ordered in camera review of attorney client communications pursuant to the crime-fraud exception (CP 7899) The crime-fraud exception should not be imposed absent a showing of need. Judge Bennett noted at CP 7906 that there may be no need in this case because of the strong

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[27] *See also* Mr. Talmadge's comment from an article in a non-adversarial setting at CP 8024.

showing of fraud. The crime-fraud exception should not be applied on remand because the claims based on the questioned third page are resolved. However, in case Walker Parties attempt to invoke Judge Bennett's ruing on remand, we raise this apparently moot issue.

E. Request for Attorney Fees On Appeal

Appellants request, pursuant to RAP 18.1, an award of attorney fees under the lease and the guaranty should they prevail on appeal. Section 16.7 of the lease provides:

> "Attorneys' Fees. In the event suit or action is instituted to interpret or enforce the terms of this Lease, the prevailing party shall be entitled to recover from the other party such sum as the court may adjudge reasonable as attorneys' fees at trial, on petition for review, or on appeal, in addition to all other; sums provided by law. (CP 3722)

Similarly, the guaranty provides:

> If Landlord retains an attorney to enforce this Guaranty or to bring any action or any appeal in connection with this Guaranty, the Lease, or the collection of any payment under this Guaranty or the Lease, Landlord shall be entitled to recover its attorneys' fees, costs, and disbursements in connection therewith, as determined by the court before which such action or appeal is heard, in addition to any other relief to which Landlord may be entitled. (CP 3794)

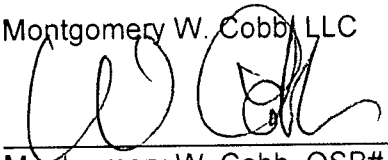
RCW 4.84.330 makes this provision reciprocal, entitling the prevailing party to recover its attorney fees. Appellants should be awarded their fees incurred on this appeal if they are the substantially prevailing party.

Conclusion

The general judgment of the Superior Court should be reversed in part. The portion of the judgment in case No. 12-2-04501-5 dismissing BGC's claims for breach of lease should be reversed and that case remanded for further proceedings. The judgment in case number 12-2-04713-1 granting declaratory relief is not challenged and should be affirmed. The supplemental judgment of the Superior Court awarding attorney fees and expenses should be reversed.

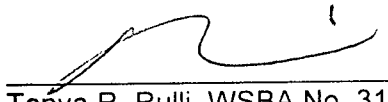
Respectfully submitted, September 12, 2016

Montgomery W. Cobb, LLC



Montgomery W. Cobb, OSB# 83173, *pro hac vice*

Law Office of Tonya Rulli



Tonya R. Rulli, WSBA No. 31465

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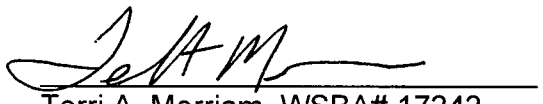
Merriam & Associates, PC



Terri A. Merriam, WSBA# 17242

attorneys for Appellants

SUPERIOR COURT OF THE STATE OF WASHINGTON

CLARK COUNTY

BATTLE GROUND CINEMA LLC, a Washington limited liability company,

Plaintiff,

v.

ROBERT AND KAREN BERNHARDT, a married couple; CHARLES MULLIGAN, an individual; SAMUEL WALKER and SHELLEY WALKER, as trustees of the WALKER FAMILY TRUST, a California trust; CHRISTOPHER WALKER and LAURA EVANS-WALKER, a married couple; SAMUEL WALKER, as trustee of the JTW TRUST, a California trust.

Defendants.

Case No. 12-2-04501-5

OPINION AND ORDER ON SAMUEL WALKER, ET AL.'S (1) MOTION FOR AWARD OF PREVAILING PARTY ATTORNEYS' FEES, EXPENSES, COSTS AND DISBURSEMENTS IN BOTH CONSOLIDATED CASES, AND (2) RCW 4.84.185 MOTION FOR AWARD OF ATTORNEYS' FEES, EXPENSES, COSTS AND DISBURSEMENTS

WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

SAMUEL WALKER AND SHELLEY WALKER, as trustees of the WALKER FAMILY TRUST, a California trust; CHRISTOPHER AND LAURA EVANS-WALKER, a married couple; JOSEPH WALKER, as trustee of the JTW TRUST, a California trust; ROBERT AND KAREN BERNHARDT, a married couple; and CHARLES MULLIGAN, an individual,

Plaintiffs,

v.

ELIE G. KASSAB, an individual; THE GARDNER CENTER LLC, a Washington limited liability company; and BATTLE GROUND CINEMA LLC, a Washington limited liability company,

Defendants.

Case No. 12-2-04713-1

WHEREAS, this matter came on regularly before the Court on motions for partial summary judgment filed by Plaintiffs Samuel Walker et al., in Case No. 12-2-04731-1 (the "Guaranty Case") and Defendants Robert Bernhardt et al., in Case No. 12-2-04501-5 (the "Lease Case") (collectively, the Plaintiffs in the Guaranty Case and Defendants in the Lease Case are referred to herein as the "Owners"), and motions for partial summary judgment filed by Plaintiff Battle Ground Cinema, LLC, in the Lease Case and Defendants Elie G. Kassab, Battle Ground Cinema, and the Gardner Center, LLC in the Guaranty Case (Elie G. Kassab, the Battle Ground Cinema, LLC, and The Gardner Center, LLC, are collectively referred to herein as "Kassab").

WHEREAS, this Court entered an order granting summary judgment in favor of the Owners on February 17, 2015.

WHEREAS, this Court entered a General Judgment on June 9, 2015, in favor of the Owners which provides that the Owners are "entitled to an award of their reasonable attorney fees, costs and disbursements as the prevailing parties in both of these consolidated cases."

WHEREAS, this matter now comes before the Court for hearing on the Owners' (1) Motion for Award of Prevailing Party Attorneys' Fees, Expenses, Costs and Disbursements (the "Fee Petition"), and (2) RCW 4.84.185 Motion for Award of Attorneys' Fees, Expenses, Costs and Disbursements, and Supporting Declarations, and Kassabs' Response to Motions for Award of Fees and Expenses and to Receive Expenses (the "Objections").

WHEREAS, the Court has received and reviewed the following:

1. The Owners' Motion for Award of Prevailing Party Attorneys' Fees, Expenses, Costs and Disbursements;

2. The Declaration of Neil N. Olsen in Support of the Owners' Motion for Award of Prevailing Party Attorneys' Fees, Expenses, Costs and Disbursements;

3. The Declaration of James J. Holland in Support of the Owners' Motion for Award of Prevailing Party Attorneys' Fees, Expenses, Costs and Disbursements;

4. Declaration and testimony of Philip A. Talmadge on Attorneys' Fees and Costs;

5. RCW 4.84.185 Motion for Award of Attorneys' Fees, Expenses, Costs and Disbursements, and Supporting Declarations;

6. BGC Parties' Response to Motions for Award of Fees and Expenses and to Receive Expenses;

7. Declaration of Tonya Rulli;

8. Declaration and testimony of Thomas C. Sand Regarding Attorney Fees and Costs;

9. Reply in Support of the Owners' Motion for Award of Prevailing Party Attorneys' Fees, Expenses, Costs and Disbursements;

10. Supplemental Declaration of Philip A. Talmadge;

11. Supplemental Declaration of Neil N. Olsen in Support of the Owners' Motion for Award of Prevailing Party Attorneys' Fees, Expenses, Costs and Disbursements;

12. Plaintiff Samuel Walker et al's Motion to Strike, or, Alternative, to Allow Further Discovery;

13. Declaration of Neil N. Olsen in Support of Plaintiff Samuel Walker Et Al's Motion to Strike, or, Alternatively, to Allow Further Discovery;

14. BGC Parties' Response to Motion to Strike or to Reopen Discovery;

15. Plaintiff Samuel Walker et al's Reply in Support of Motion to Strike, or, Alternatively, to Allow Further Discovery.

16. The remaining pleadings filed herein and the previous hearings held before this court.

WHEREAS, having heard the arguments of counsel and the testimony of attorney fee experts, and now being fully advised in the matter;

NOW THEREFORE, it is hereby ORDERED that the Owners are awarded attorneys' fees, costs, expenses, and disbursements in the amount of $1,804,949.61.

The award of $1,804,949.61 is supported by the following findings of fact and conclusions of law, and shall be set forth in a subsequent Supplemental Judgment.

I. FINDINGS OF FACT

The entitlement to reasonable fees has been established by this court's order on summary judgment and is not contested on these motions for an award of fees and expenses. The parties also agree to the reasonableness of the hourly rates charged by attorneys and staff for the Owners.

The summary judgment procedure only allows the court to determine whether there are or are not "genuine issue as to any material fact." CR 56(c).

The Court cannot make findings of the facts on the merits of the underlying case because the Court granted summary judgment and the disposition of the claims necessarily did not involve determinations of fact. It would be improper for the Court to make findings of fact on the merits of the underlying case where the facts of the underlying case were not fully litigated. This case was resolved on motions for summary judgment and the subsequent voluntary dismissal of the Walker Parties' counterclaims in Case No. 12-2-04501-5.

Because the Court does not make findings of fact when granting a Motion for Summary Judgment, it is incumbent upon the parties to make a record sufficient to uphold the Court's granting of Summary Judgment on appellate review. It is undisputed and this Court also finds that the amount in controversy in the Guaranty Case and Lease Case was approximately $5,000,000.

The Court finds that Kassab's claims and defenses in the Guaranty Case and Lease Case were frivolous and advanced without reasonable cause and support an award of attorneys' fees, costs, expenses, and disbursements pursuant to RCW 4.84.185.

Expert Witness and Lay Witness Testimony

1. Thomas C. Sand

In support of Kassab's Objections, Kassab presented the expert testimony of Thomas C. Sand. Thomas C. Sand's characterizes the litigation as a "relatively straightforward breach of contract matter" and that Owners' counsel over-litigated the Guaranty Case and Lease Case. (Declaration of Thomas C. Sand Regarding Attorney Fees and Costs ("Sand Decl.") ¶ 13). For example, Mr. Sand argues that "nearly 20 depositions were noticed when about five depositions should have been sufficient," and questions why 30 document subpoenas were served. (*Id.*) Mr. Sand also suggests that "the [Owners] prevailed on a motion for summary judgment so there was no need to prepare for and conduct a trial." (*Id.*) Further, Mr. Sand states that "[a]n extraordinary amount of time was spent on discovery matters," and "document review." (Sand Decl. ¶ 18). Mr. Sand also argues that "[t]here were ten expert witnesses retained (or at least consulted), while one or two experts should have sufficed." (Sand Decl. ¶ 26 (emphasis in original)).

At the same time, Mr. Sand readily admits that he has not fully reviewed the record. In fact, Mr. Sand notes that "I have not undertaken an in-depth review of the entire record of this case as it is voluminous and duplicative in many instances." (Sand Decl. ¶ 8). Indeed, Mr. Sand acknowledges that he has only a "general understanding of the factual and procedural background of the case." (*Id.*) Yet, despite such "general understanding," Mr. Sand feels confident to state that "[i]n my opinion, such a review is not necessary to allow me to reach an informed judgment about the necessity and reasonableness of the hours recorded by the attorneys and paralegals." (Sand Decl. ¶ 8). Mr. Sand's "general understanding," however, does not provide appropriate guidance for the Court to make a decision regarding the reasonableness of attorneys' fees, costs, expenses, and disbursements. Moreover, this Court disagrees that the Lease Case and Guaranty Case involved a "relatively straightforward breach of contract matter." The Lease Case and Guaranty Case were extraordinarily complex cases involving skilled advocacy for more than a three year period. Further, as explained below, this Court will not engage in second-guessing litigation strategy. Accordingly, this Court finds that Mr. Sand's assertions lack creditability. This Court also finds that Mr. Sand's criticism regarding document discovery and expert witnesses lacks credibility for the reasons stated below.

Further, the Court finds that Mr. Sand's testimony at the hearing on December 3, 2015 was not materially different than Mr. Sand's declaration.

2. Scott Whipple

In support of Kassab's Objections, Kassab also presented the expert testimony of Scott Whipple. For the reasons and argument stated at the hearing on December 3, 2015, this Court precluded the testimony of Mr. Whipple, including the fact that Kassab disclosed Mr. Whipple on November 25, 2015, approximately one week before the hearing without any disclosure of the substance of Mr. Whipple's testimony. This Court, however, permitted Kassab's counsel to present an offer of proof. Although this Court precluded such testimony, this Court did not find the evidence presented during the offer of proof as helpful to the Court and lacked credibility. Even if permitted to substantively testify at the hearing, this Court would not have considered the testimony of Mr. Whipple in making this Court's decision herein.

3. Ed Gambee

The Declaration of Ed Gambee is hereby stricken from the record as ordered in open court on September 23, 2015, and for the reasons set forth in the Owners briefing in connection thereunder.

4. Philip A. Talmadge

As indicated above, this Court reviewed the Declaration of Philip A. Talmadge on Attorney Fees and Costs, the Supplemental Declaration of Philip A. Talmadge, and listened to the testimony of Philip A. Talmadge at the hearing on December 3, 2015. This Court finds that Justice Talmadge's length and depth of experience is compelling. Justice Talmadge's analysis was thorough and well-reasoned. Accordingly, this Court finds Justice Talmadge's opinions as entirely helpful to this Court's determination of an award of attorneys' fees, costs, expenses, and disbursements.

A. The Gravaman of the Guaranty Case and Lease Involved the Third-Page of the Guaranty

This Court finds that the Guaranty Case and Lease Case are interrelated and involve a common core of facts. Further, all work performed was expended in pursuit of the ultimate result

achieved. Indeed, the Owners prevailed on breach of contract and declaratory relief claims to the effect that the Guaranty is effective for the full term of the Lease, which granted complete relief to the Owners. This Court did not reach the claims for fraud and misrepresentation in the Guaranty Case because such claims were pled in the alternative to the breach of contract and declaratory relief. (See Supp. Olsen Decl. Ex HH (General Judgment)). The Court never held that the Owners were "unsuccessful" on such claims, or that Kassab somehow "prevailed' on the claims for fraud and misrepresentation.

This Court finds that the gravamen of the entire Guaranty Case centered on proving one crucial fact—that the Guaranty is effective for 25 years. That is, in short, the central dispute involved whether the personal Guaranty is effective for the full 25-year term of the Lease (as the Owners claim) or for 10 years (as Kassab claims). Indeed, whether prosecuting the breach of contract claim and declaratory relief claims, or the fraud and misrepresentation claims, the cases centered on the existence and legitimacy of the third-page of the Guaranty. And once Kassab successfully consolidated the Guaranty Case and Lease Case, Kassab inescapably made the third-page of the Guaranty the central issue in the entire case.

In sum, all claims for relief sought to provide a remedy to the purported third page of the Guaranty that purported to limit the duration of the Guaranty to 10 years. Whether the claim sounded in declaratory relief, breach of contract, fraud, or misrepresentation, the Owners sought relief based upon one issue—the effectiveness of the Guaranty. Consequently, these cases involved a "common core" of facts—the existence and legitimacy of third-page of the Guaranty.

Accordingly, this Court does not view the lawsuit as a series of discrete claims and the overall relief obtained was reasonable in relation to the hours reasonably expended on the litigation. In other words, this Court finds that the Owners prevailed on breach of contract and declaratory relief, which is inseparable from the issues presented in the Owners' alternative claims for relief. The fact that this Court did not reach certain alternative claims for relief does not prevent an award of attorneys' fees, costs, expenses, and disbursements.

Further, this Court finds that the Owners reasonably dismissed comparatively minor counterclaims in the Lease Case to avoid continued and unnecessary litigation in light of the summary judgment ruling

B. All Subpoenas and Depositions were Necessary to Achieve Summary Judgment

To suggest in hindsight that the Owners need only pursue as much investigation and discovery as required to prevail on their Summary Judgment motions is ludicrous. Kassab continued his efforts to prove the existence of the purported third-page of the Guaranty by attempting to submit a declaration from Ed Gambee in support of his response to the Owners Motion for Fees.

A description of each subpoena and deposition in both cases is attached to the Supplemental Declaration of Neil N. Olsen as Exhibit AA. This Court finds that the Owners' counsel had reasonable and justifiable cause to subpoena and depose each individual and entity. Furthermore, this Court finds that the depositions and subpoenas proved useful and critical to obtaining summary judgment in both the Guaranty Case and Lease Case. No third-party—other than the Ball Janik law firm—produced a copy of the third-page in discovery, despite subpoenas to all persons who could or should have a copy of the Guaranty. Further, other than Kassab's former assistant, Brooke Pool, no witness conceivably connected with the Guaranty could remember an alleged third-page to the Guaranty. As such, the subpoenas and depositions effectively prevented Kassab's ability to create factual questions regarding the authenticity of the third-page of the Guaranty.

C. Extensive Electronic Discovery was Necessary and Proved Useful

This Court finds that extensive electronic discovery was necessary and proved useful. Indeed, electronic discovery between the parties was instrumental in proving that the third-page to the Guaranty, in fact, did not exist in any legitimate form and receiving summary judgment in both the Guaranty Case and Lease Case. The extensive discovery, involving both the Owners' records and Kassab's records, revealed absolutely no other copy of the third-page. In fact, the Owners discovered the opposite in Kassab's records—that Kassab himself and his fellow employees emailed copies of the Battle Ground Cinema lease containing a two-page unlimited guaranty in 2009 and 2011.

D. The Owners Had Reasonable and Justifiable Cause to Hire Several Experts

This Court finds that the Owners' had reasonable and justifiable cause to hire each expert retained in the Guaranty Case and Lease Case, including: (1) experts concerning the authenticity of the third page; (2) damages experts; (3) experts concerning property management standard of care; and (4) trial presentation consultants.

E. Summary of Attorney Fees, Expenses, Costs and Disbursements of Owners

This Court finds that the following recitation of attorneys' fees, expenses, costs and disbursements are a fair and actual attorneys' fee, expenses, costs and disbursements incurred.

Total All Guaranty Case Fee Billings:	**$1,318,636.02**
Total All Ease Case Fee Billings:	**$214,068.50**
Total Guaranty Expenses, Costs And Disbursements:	**$239,081.22**
Total Lease Expenses, Costs And Disbursements:	**$3,163.87**
Anticipated November 1, 2015 Fees, Expenses, Costs and Disbursements:	**$30,000.00**
TOTAL:	**$1,804,949.61**

II. CONCLUSIONS OF LAW

A. Owners are Entitled to Attorney Fees, Costs, Expenses and Disbursements under the Guaranty and Lease

Attorney fees and costs may be awarded when authorized by a contract, a statute, or a recognized ground in equity. *LK Operating, LLC v. Collection Group, LLC*, 181 Wn.2d 117, 123 (2014). When an action is based on a contract containing an attorney fee clause, RCW 4.84.330 entitles the prevailing party to a fee award. Generally, attorney's fees in contract cases may be awarded if the contract at issue contains a provision specifically providing for attorney's fees upon breach or other stipulated circumstances. In other words, "an award of attorney fees based on a contractual provision is appropriate when the action arose out of the contract and the contract is central to the dispute." *Cornish College of the Arts v. 1000 Virginia Ltd. P'ship*, 158 Wn. App. 203,

231 (2010). "A party may be awarded attorney fees based on a contractual fee provision at the trial and appellate level." *Renfro v. Kaur*, 156 Wn. App. 655, 666-67 (2010).

The Lease and Guaranty signed by both the Owners and Kassab both contain a provision for an award of attorneys' fees to the prevailing party if litigation is necessary to settle the parties' rights and obligations under the contracts:

> 16.7 Attorneys' Fees. In the event suit or action is instituted to interpret or enforce the terms of this Lease, the prevailing party shall be entitled to recover from the other party such sums as the court may adjudge reasonable as attorneys' fees at trial, on petition for review, or on appeal, in addition to all other sums provided by law.

(Olsen Decl. Exh. Z, Lease, at 12).

> Guarantor hereby agrees to indemnify, protect, defend and hold Landlord harmless from and against all claims, liabilities, losses and expenses, including legal fees, suffered or incurred by Landlord as a result of claims to avoid any payment received by Landlord from Tenant with respect to the obligations of Tenant under the Lease.

(*Id.*, Guaranty at 1).

> If Landlord retains an attorney to enforce this Guaranty or to bring any action or any appeal in connection with this Guaranty, the Lease, or the collection of any payment under this Guaranty or the Lease, Landlord shall be entitled to recover its attorneys' fees, costs, and disbursements in connection therewith, as determined by the court before which such action or appeal is heard, in addition to any other relief to which Landlord may be entitled. Any amount owing under this Guaranty shall bear interest from the date such amount was payable to Landlord to the date or repayment at a rate equal to the lesser of 18% and the maximum rate permitted by the law.

(*Id.*, Guaranty at 2). Accordingly, as the prevailing parties in both the Guaranty Case and Lease Case, the Owners are entitled to an award of attorneys' fees, costs, expenses, and disbursements. Notably, Kassab does not contest that the Owners are entitled to an award of their reasonable attorney fees, costs, expenses and disbursements under the Guaranty and Lease as the prevailing parties in both of these consolidated cases.

B. The Court Employs the Lodestar Methodology

A determination of reasonable attorney fees begins with a calculation of the "lodestar," which is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly

rate. *Berryman v. Metcalf*, 177 Wn. App. 644, 660 (2013) *review denied sub nom. Berryman v. Farmers Ins. Co.*, 179 Wn.2d 1026 (2014). Kassab does not contest the hourly rate of the Owners' counsel.

Kassab argues that the "[Owners'] motions and accompanying submissions do not provide the Court with the evidence and information needed to assist the Court in following the methodology prescribed the by the Supreme Court." (Opposition, at 7). This Court disagrees and finds that the Owners' counsel presented reasonable documentation of the work performed in the form of contemporaneous records documenting the hours worked. Further, the Owners have informed this Court of the type of biller and the work performed in addition to the number of hours worked. *See Miller v. Kenny*, 180 Wash. App. 772, 822, 325 P.3d 278, 303 (2014).

In the Fee Petition, filed on June 22, 2015, the Owners previously requested $1,666,610.49, in total attorneys' fees, expenses, costs, and disbursements. (*See* Fee Petition). At the time, the Owners submitted contemporaneous time records from commencement of the litigation in 2012 through May 31, 2015. The Owners have requested an additional $108,339.12 in total attorneys' fees, expenses, costs, and disbursements, which the Owners have incurred through June 1, 2015 to October 31, 2015. (Supp. Olsen Decl. Exs. JJ, KK, LL, MM). Additionally, the Owners have requested another $30,000 in anticipated attorneys' fees, expenses, costs, and disbursements, for November 1, 2015 through December 3, 2015. Accordingly, the Owners request $1,804,949.61 in total attorneys' fees, expenses, costs, and disbursements. A more detailed description of the fees requested and the hour worked is located within the Owners' Reply in Support of the Fee Petition. (*See* Reply, at 4-7)

C. The Requested Attorney Fees, Expenses, Costs and Disbursements are Reasonable

This Court concludes that the number of hours worked and billed are reasonable and hereby awards the full amount requested. As a general matter, the amount in controversy was more than $5 million. If the Owners lost these cases, the Owners would likely lose the anchor tenant of the Gardner Center and the full personal guaranty of such tenant's lease—a loss valued conservatively in the many millions of dollars. Accordingly, this litigation required the Owners to "bet the farm." But

for their access to credit, lack of alternative options, Kassab would have succeeded in avoiding his obligations under the Guaranty and Lease. (Holland Dec., ¶ 8). Additionally, the fact that Kassab either knew or should have known that the third-page is a forgery is persuasive as additional support for awarding the full amount of requested attorneys' fees, costs, expenses, and disbursements.

This is compounded by the fact that Kassab relentlessly pursued this litigation. Kassab's conduct caused the Owners to incur millions of dollars in expense and drag out unnecessary litigation for more than two years. The Owners were forced to pursue an action against Kassab and his entities and prove that the purported third-page, in fact, never existed in any legitimate form. Accordingly, to prove that a single page never existed, discovery involved hundreds of thousands of pages of documents spanning back more than ten (10) years. After bitter resistance, discovery included documents from: Kassab's numerous business entities and employees, the realtors and brokerage houses who marketed and listed the property and realtors who helped purchase the property, formal appraisal documents and files, due diligence files, attorney files and records, title company files and records, bank files and records documenting financing, and countless other documents and emails. The document production alone resulted in nearly 500,000 pages of documents.

The Owners set about the daunting task of proving Kassab laundered the third-page of the personal guaranty through his own lawyers, real estate brokers, employees, accountants and others over the course of several years. This effort required a massive legal undertaking. The Owners were required to depose former lawyers, bankers, loan officers, employees, third parties, and nearly anyone associated with Kassab or Battle Ground Cinema, LLC ("Battle Ground").

The Owners were also forced to retain and prepare a multitude of experts, including: bankers, real estate appraisers, cinema industry experts, economists, forensic document examiners, property managers, and waste management experts. Third party and other lay witnesses expected to be called at trial would have numbered in the dozens.

Additionally, the records on file with this Court reflect the several discovery motions and other issues briefed, argued and ruled upon by appointed discovery master Judge Roger Bennett (Retired), whose involvement became a necessity in these highly contentious cases with substantial amounts in controversy.

Throughout the process, Kassab steadfastly refused to acknowledge that the Guaranty was personal and was for the entire duration of the lease. Rather, Kassab continued to assert under oath that the third page was authentic. Kassab's actions required the Owners to legally prove that the world was in fact round (prove a negative – that the third page was not authentic). This required the owners to commit extraordinary financial resources and effort or risk a disastrous loss to their investment. The Owners were effectively forced to expend $1,804,949.61 in total attorneys' fees, expenses, costs, and disbursements. Unraveling years of sophisticated business, real estate and banking transactions took more legal effort than most could financially bear, and but for the Owners' access to credit the result may well have been different.

D. The Award of Attorneys' Fees, Costs, Expenses and Disbursements Complies with RPC 1.5

A lodestar fee must generally comply with the ethical rules for attorneys, including the general rule that a lawyer shall not charge an unreasonable fee. RPC 1.5; *Berryman*, 177 Wn. App. at 660. Here, the award of $1,804,949.61 complies with RPC 1.5.

First, this case involved significant time and labor to discover the true facts and prove a negative; that Kassab's purported third-page of the Guaranty does not exist in any legitimate form. *See*, RPC 1.5(a)(1). Discovery required obtaining and reviewing hundreds of thousands of pages of documents from numerous sources and conducting extensive depositions. Discovery was contentious, eventually requiring appointment of Special Discovery Master Judge Roger Bennett (retired). Once the cases were consolidated, the difficulty and stakes increased, requiring significant skill and resources to effectively prosecute one case for specific performance (with claims made in

the alternative), and defend another case against very different allegations of breach of lease (which included counterclaims). RPC 1.5(a)(1), (7).

Second, these cases consumed both Zupancic Rathbone Law Group and Holland Law Group as counsel for the Owners. The degree of extensive discovery, motion practice, and case management required numerous resources. Accordingly, these cases precluded both Zupancic Rathbone Law Group and Holland Law Group from devoting significant time and energy to other cases for more than two years. (Holland Decl. ¶ 12; Olsen Decl. ¶ 41).

Third, although Kassab does not contest the hourly rate, this Court nevertheless finds that the fees that both Zupancic Rathbone Law Group and Holland Law Group charged were reasonable in the area for similar legal services. (Olsen Decl. ¶ 42).

Fourth, many millions of dollars were at stake should the Owners lose either the Guaranty Case or Lease Case. The risk to the Owners included a very real possibility that a jury would be sufficiently overwhelmed and simply conclude that both parties deserved to lose. In this scenario the Owners stood to lose 15 years' worth of lease payments, which would enable Kassab to fold the Battle Ground Cinema, LLC a limited liability company with few assets, and walk from the lease without penalty. Such a result would also seriously diminish the value of the Gardner Center property by many millions of dollars.

Fifth, the Owners needed to resolve the dispute as quickly as possible. Because the Owners own and operate the Gardner Center, the lease payments with Battle Ground Cinema are crucial to solvent cash flow. Thus, despite the fact that the litigation took more than two years, the Owners worked as efficiently as possible to obtain the desire result—that Battle Ground Cinema remain a paying tenant and Kassab affirm the Guaranty. (Olsen Dec. ¶ 43).

Sixth, both firms have maintained ongoing professional relationships with the Owners. Both Zupancic Rathbone Law Group and Holland Law Group have provided other business and real estate advice in the past. (Holland Decl. ¶ 13; Olsen Dec. ¶ 44).

Seventh, Holland Law Group's involvement in these matters helped provide local knowledge, first-chair trial experience in Clark County, Washington, familiarity with local jury pools and prevailing community attitudes with regard to both the claims in dispute and the parties involved, and additional man-power on complex, consolidated commercial cases throughout the heavy discovery and motions practice occurring during substantial depositions of key players and witnesses. (Holland Decl. ¶ 14). The Owner's ability to obtain a result such as the one in this case on Summary Judgment was in large part a result of a highly effective division of labor and solid working relationship between the Zupancic Rathbone Law Group and local trial counsel Holland Law Group. *See* RPC 1.5(a)(4), (6), (7). Given the overwhelming amount of discovery, necessary consultation with experts and the difficult task of effectively distilling the evidence gathered to present a coherent Motion for Summary Judgment, a smaller firm or fewer attorneys would have taken a substantially longer period of time to bring this matter to conclusion.

Mr. Olsen at Zupancic Rathbone Law Group, P.C., provided substantial leadership on this case and acted as lead co-counsel. Mr. Olsen has practiced as a real estate, construction and business litigator in the Portland and Vancouver areas since 2005. (Olsen Decl. ¶ 5). Sean Mazorol at Zupancic Rathbone Law Group, P.C., also provided assistance and has been practicing as a commercial and real estate litigator since 2012. (*Id.*)

Eighth, both Zupancic Rathbone Law Group and Holland Law Group charged an hourly rate. The Holland Law Group billed the Owners $300/hour for the work performed by Jim Holland, Jr. (James J. Holland). After Jim Holland, Jr. became actively involved as co-lead trial counsel with Neil Olsen from the Zupancic Rathbone Law Group, Jim Holland, Sr. (James I. Holland) wrote off more than $80,000 in time expended on these matters. These fees were *not* passed on to the clients and are not being passed on to Kassab.

In total, the Owners incurred $1,804,949.61 in attorneys' fees, costs, expenses, and disbursements related to both the Guaranty and Lease cases. All of these fees and costs were reasonable, necessary and required to obtain the excellent result of being the prevailing party on both

matters on summary judgment. The award of $1,804,949.61 in in attorneys' fees, costs, expenses, and disbursements complies with RPC 1.5.

E. Kassab's Objections Are Not Warranted

1. The Owners Pursued an Efficient and Effective Litigation Strategy

Kassab argues that the Owners "not only over litigated the fraud issues, they had a viable option not to pursue fraud at all." (Opposition, at 18). "Another option," Kassab argues, "would have been to pursue the declaratory judgment on a detrimental reliance or negligent misrepresentation theory" because "[t]he elements are much easier to prove than fraud." (Opposition, at 18). Kassab's argument, however, belies the fact that the Owners were, in fact, successful in affirming that the Guaranty is effective for the full term of the Lease. In other words, despite Kassab's alternative "option," the Owners prevailed on their claims and proved what Kassab should have done—affirm the Guaranty. Furthermore, this Court declines to engage in second-guessing litigation strategy. *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 422 (1978).

Kassab also argues that proving that the third page, in fact, never existed was not "necessary" to prove declaratory relief and breach of contract. Kassab suggests that "[w]hat [the Owners] needed to prove was that they had not seen the third page and that it had not been included in the documents they were provided when they purchased the Gardner Center." (Opposition, at 15). And once the Owners produced such evidence, Kassab suggests "it would have been incumbent on Mr. Kassab to find evidence that it existed and was received." (Opposition, at 15-16). Because it was "incumbent on Mr. Kassab to find evidence that it existed and was received," Kassab suggests that the Owners "unnecessarily undertook to do Mr. Kassab's work for him, so to speak." (Opposition, at 16).

Again, however, as explained above, this Court declines to engage in second-guessing litigation strategy. In addition, Kassab's suggested strategy is ill-advised. It is ludicrous to suggest that Kassab would adamantly promote the existence of the third-page of the guaranty and seriously expect the Owners to wait for Kassab to produce more evidence that such document exists. If the third-page of the Guaranty is suspicious, then any further evidence of third-page is equally

suspicious. Moreover, Kassab's argument neglects the fact that if Kassab produced evidence to authenticate the third-page, the Owners were required to rebut such evidence to meet their burden of proof. The Owners could not leave the burden of proof to chance, especially considering the suspicious nature of the third-page of the Guaranty and the amount of money the Owners stood to lose if Kassab prevailed.

The Owners' counsel therefore took the reasonable and justifiable position that the Owners needed to procure the evidence and witnesses to affirmatively prove that the third-page of the Guaranty, in fact, does not exist in any legitimate form. The Owners' counsel primarily directed all depositions and subpoenas at ensuring, and proving, that nobody connected with the Guaranty either had a credible copy of the third-page of the Guaranty or credibly remembered the third-page of the Guaranty. (*Id.*) The need to prevent Kassab from affirmatively procuring evidence to support the legitimacy of the third-page of the Guaranty is supported by the examples that the Owners cited in the Reply in Support of the Fee Petition regarding Kassab's attempts to authenticate the third-page of the Guaranty through the testimony of Kory Arnston and Ed Gambee. (Reply, at 17-19).

Therefore, to succeed in such task, Owners' counsel reasonably and justifiably sent numerous subpoenas to third-parties and took 19 depositions. A description of each subpoena and deposition in both cases is attached to the Supplemental Declaration of Neil N. Olsen as Exhibit AA. The Owners' counsel had reasonable and justifiable cause to subpoena and depose each individual and entity. Furthermore, the depositions and subpoenas proved useful and critical to obtaining summary judgment in both the Guaranty Case and Lease Case. No third-party—other than the Ball Janik law firm—produced a copy of the third-page in discovery, despite subpoenas to all persons who could or should have a copy of the Guaranty. As such, the subpoenas and depositions effectively prevented Kassab's ability to create factual questions regarding the authenticity of the third-page of the Guaranty.

2. Extensive Document Discovery was Necessary

In addition to Kassab's apparent frustration concerning necessary depositions, Kassab also claims that electronic discovery was not necessary. (Opposition, at 5). The Court disagrees. In January 2013, just after the litigation started, the Owners propounded comprehensive discovery requests on Kassab and his entities seeking production of evidence regarding the third-page of the Guaranty. (Olsen Decl. ¶ 12). In February 2013, Kassab and his entities made approximately two boxes of documents available at the office of attorney Ben Shafton, numbering about 2000 pages. (*Id.*) The 2000 pages of documents, however, provided no credible clue regarding the existence of the third-page of the Guaranty. (*Id.*) Kassab's attorneys also claimed that electronic records no longer existed, as it had been destroyed by Kassab and his entities. (*Id.*) Accordingly, forensic examination of electronically stored information was necessary to ascertain the true nature of the third-page of the Guaranty.

The Owners demanded that Kassab and his entities agree to produce electronically discovery information previously deleted or destroyed by Kassab. (*Id.* ¶ 14, Exs. E and F (March 21, 2013 and July 18, 2013 Olsen Conferral correspondence to Shafton)). Kassab's counsel disagreed and the Owners moved to compel the production of electronically stored information. (*Id.* ¶ 16). Judge Bennett rejected Kassab's objection and ordered Kassab to produce such evidence. (*Id.* ¶ 16, Exs. H and I (Owners January 27, 2014 Motion to Compel; Judge Bennett's February 9, 2014 Order). In his ruling, Judge Bennett explained that "[t]he original document, whether it consisted of two or three pages, had to exist in the Defendants' computer files at some point," and that "[i]t appears to me that there is a clear nexus between the claim brought: that the computer-originated document is a forgery, and the Defendant's computers." (*Id.* Ex. I, at 5). As such, Judge Bennett stated that "[t]he advent of the third page creates a discrepancy which cannot be ignored, and needs to be investigated." (*Id.* Ex. I, at 6). This Court agrees with the assessment of Judge Bennett.

The document review and production proved to be a massive undertaking. More than 500,000 documents were produced, which took long hours to appropriately review. (Holland Decl. ¶

8). As part of Judge Bennett's ruling, however, the Owners fronted the entirety of the expense of electronic discovery. (Olsen Decl. Ex. I, at 6). The electronic discovery between the parties became instrumental in proving that the third-page to the Guaranty, in fact, did not exist in any legitimate form and receiving summary judgment in both the Guaranty Case and Lease Case. The extensive discovery, involving both the Owners' records and Kassab's records, revealed absolutely no other copy of the third-page. The Owners discovered the opposite in Kassab's record, that Kassab himself and his fellow employees emailed copies of the Battle Ground Cinema lease containing a two-page unlimited guaranty in 2009 and 2011.

3. The Guaranty Case and Lease Case Required Several Experts

In addition to the depositions, subpoenas, and document discovery, Kassab also complains about the need for experts in this case. This Court declines to engage in second-guessing Owners' counsel regarding the need for experts. Even then, this Court finds that the Owners' counsel had reasonable and justifiable cause to hire several experts.

Several experts were necessary to establish that the third-page is, in fact, a forgery. (Supp. Olsen Decl. ¶ 6). The Owners primarily relied upon James A. Green, a former police detective and Diplomate of the American Board of Forensic Document Examiners, who concluded that the third page is a forgery, specifically stating that "the evidence compelled my opinion that the alleged third page of the guaranty is the result of a 'cut and paste' fabrication using page 16 of the underlying lease as its source." (*Id.*) Additionally, the Owners received an expert report from A. Frank Hicks, another Forensic Document Examiner. (*Id.*) Mr. Hicks uses a slightly different analysis, but also concluded that the purported third-page of the Guaranty is a forgery. (*Id.*) The Owners also received a report from Matthew Waugh, an IT expert with special expertise in PDF documents. (*Id.*) Mr. Waugh confirmed that the third-page is a cut and paste fabrication using other portions of the Lease. (*Id.*) The Owners also retained and consulted a linguistics expert and a handwriting expert to analyze the language used on the third-page of the Guaranty as well as some other highly suspicious documents, such as the letter allegedly sent to Ball Janik from Matrix Advisors IV. (*Id.*) This Court finds that

the experts were necessary to both the Guaranty Case and Lease Case. To reduce expense, however, the Owners exercised considerable judgment in only receiving reports from the forensic document examiners as well as the IT specialist. (*Id.*)

Several experts were also retained and consulted to establish that the Gardner Center suffered immense financial damage. (Supp. Olsen Decl. ¶ 7). Kassab adamantly defended that there were no damages, even claiming that this Court should grant summary judgment because there were no damages. (*See generally* Motion for Partial Summary Judgment by Defendants Elie G. Kassab, the Gardner Center LLC and Battle Ground Cinema LLC in Case No. 12-2-04713-1 and in Case No. 12-2-04501-5). And in these fee proceedings, Kassab still argues that "no damages were at stake." (Opposition, at 5). Accordingly, to refute such assertions, the Owners retained Don Palmer, an expert appraiser, as well as Michael Wilkerson, a real estate economist, to testify concerning the actual damages to the business and real estate without the full-term of the Guaranty. (Supp. Olsen Decl. ¶ 7). The Owners retained and consulted a commercial real estate broker, Gary Hunter, to testify concerning the difficulty in selling the Gardner Center without a full-term Guaranty. (*Id.*) The Owners also retained and consulted Bill Doeren, a cinema industry expert to explain the changes in the cinema industry during the time that Kassab began to experience financial difficulty and the potential impact to the Owners if the cinema industry continued to falter without a full-term Guaranty. (*Id.*) Relatedly, the Owners retained and consulted a banking and financial expert to explain the commercial practice with respect to full-term guarantees in commercial real estate transactions. (*Id.*) This Court finds that these experts were necessary to both the Guaranty Case and Lease Case. To reduce expense, however, the Owners exercised considerable judgment in never receiving final expert reports from the damage experts until such reports were absolutely necessary. (*Id.*)

To defend the Lease Case, the Owners hired experts concerning property management standard of care. (Supp. Olsen Decl. ¶ 9). Specifically, in the Lease Case, Kassab claimed that the Owners were not properly managing the property, including maintaining the garbage area in proper

condition. (*Id.*) Accordingly, the Owners also retained and consulted Shane Smith, a property management expert, as well as Phillip Schmidt-Pathmann, a garbage expert. (*Id.*) This Court finds that these experts were necessary to defend the Lease Case. Again, to reduce expense, the Owners exercised considerable judgment in never receiving final expert reports from the property management experts until such reports were absolutely necessary. (*Id.*)

Finally, considering the complexity of the case, the Owners' counsel very briefly consulted with trial consultants to prepare an effective overall trial strategy in the event that the summary judgment was denied. (Supp. Olsen Decl. ¶ 10). If the Motion for Summary Judgment were denied, the Owners faced a trial date within months of the hearing on the Motion for Summary Judgment.

Although trial consultants are not testifying experts, such fees and costs for trial consultants has been held recoverable. *See, e.g., Confederated Tribes of Siletz Indians of Oregon v. Weyerhaeuser Co.*, No. CV 00-1693-A, 2003 WL 23715982, at *9 (D. Or. Oct. 27, 2003) (unpublished) *aff'd sub nom. Confederated Tribes of Siletz Indians of Or. v. Weyerhaeuser Co.*, 411 F.3d 1030 (9th Cir. 2005) *vacated and remanded on other grounds sub nom. Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 127 S. Ct. 1069, 166 L. Ed. 2d 911 (2007) *and vacated on other grounds*, 484 F.3d 1086 (9th Cir. 2007) (collecting cases where fees and costs of trial consultants were awarded). This Court finds that consulting trial experts was reasonable and justified considering the complexity of the Guaranty Case and Lease Case, the looming trial date and the amount in controversy.

4. Separation of Fees and Costs between the Guaranty Case and Lease Case is Unnecessary

Kassab argues that "the [Owners] have not segregated or allocated the attorney time according to the claim to which it applied." (Opposition, at 9). Kassab specifically argues that the Owners should separate the fees and costs between the Guaranty Case and Lease Case. To support such argument, Kassab states that the "[t]he issues in these two cases are not coterminous." (Opposition, at 9). Because the two cases "are not coterminous," Kassab therefore concludes that the Owners

should separate the fees. Contrary to Kassab's assertions, however, the Owners did, in fact, separate the fees according to the Guaranty Case and Lease Case. (*See* Fee Petition, at 19; Reply, at 4-7).

Furthermore, this Court concludes that segregation of the fees and costs between the Guaranty Case and Lease Case is unnecessary because the Guaranty Case and Lease Case are interrelated and involve a common core of facts. *Travis v. Washington Horse Breeders Ass'n, Inc.*, 111 Wash. 2d 396, 410-11, 759 P.2d 418, 425 (1988); *Hume v. Am. Disposal Co.*, 124 Wash. 2d 656, 673, 880 P.2d 988, 997 (1994); *Mayer v. Sto Indus., Inc.*, 156 Wash. 2d 677, 692-93, 132 P.3d 115, 122-23 (2006); *Miller v. Kenny*, 180 Wash. App. 772, 823-24, 325 P.3d 278, 303-04 (2014). Further, Justice Talmadge noted that "segregation of time would have been impossible where the issues in the lease and guaranty cases were inextricably intertwined." (Talmadge Decl. ¶ 9). Kassab, in fact, previously agreed and strenuously argued that the Guaranty Case and Lease Case are "logically related." (See Supp. Olsen Decl. Ex. FF (Motion to Consolidate, at 2)). Indeed, Kassab's present arguments are in direct contradiction to Kassab's previous arguments. Before September 17, 2014, the Guaranty Case and Lease Case remained separate and distinct cases. In August 2014, however, Kassab moved to consolidate the Guaranty and Lease Case specifically because "[t]he two cases are logically related; they involve the same Lease and Guaranty; the same factual evidence will be presented in both cases." (*Id.* Ex. FF (Motion to Consolidate, at 5)). Further, Kassab argued that "not consolidating the two cases would result in duplicative work by the parties and the Court." (Id. Ex. FF (Motion to Consolidate, at 6)). Utilizing such argument, Kassab, in fact, prevailed in persuading this Court to consolidate the Guaranty Case and Lease Case. In response, the Owners actually warned that "[c]onsolidating these two cases will hinder the parties' ability to properly segregate recoverable damages in each of the two cases," including attorneys' fees and costs. (Id. Ex. GG (Plaintiffs' Opposition to Defendants' Motion to Consolidate, at 3)).

5. The Owners Prevailed on the Entirety of their Claims for Relief

Kassab also seeks to require segregation between alleged "successful" and "unsuccessful" claims. Specifically, Kassab argues that "the [Owners] did not prevail on their claims for fraud and

misrepresentation or on their counter claims in the Lease Case." (Opposition, at 10). Accordingly, Kassab argues that "[the Owners] are entitled only to the fees reasonably necessary to the claims they did win: [t]heir declaratory judgment claim and their defense of BCG's breach of lease claim." (Opposition, at 10). And because the Owners were "unsuccessful," as the argument goes, the Owners should not receive fees for pursuing such claims. Kassab also claims that the Owners voluntarily dismissed counterclaims in the Lease Case and should not receive fees for such dismissal. (Opposition, at 17).

Such argument, however, ignores the fact that the Owners prevailed on the entirety of their claims—"[t]he result is what matters." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983); *see also Brand v. Dep't of Labor & Indus. of State of Wash.*, 139 Wash. 2d 659, 672, 989 P.2d 1111, 1117 (1999), *as amended on denial of reconsideration* (Apr. 10, 2000), *as amended* (Apr. 17, 2000). This Court finds that all work performed was expended in pursuit of the ultimate result achieved. Indeed, the Owners prevailed on breach of contract and declaratory relief claims to the effect that the Guaranty is effective for the full term of the Lease, which granted complete relief to the Owners. This Court did not reach the claims for fraud and misrepresentation in the Guaranty Case because such claims were pled in the alternative to the breach of contract and declaratory relief. (See Supp. Olsen Decl. Ex HH (General Judgment)). The Court never held that the Owners were "unsuccessful" on such claims, or that Kassab somehow "prevailed' on the claims for fraud and misrepresentation. In fact, the General Judgment recognizes that such claims were dismissed "as moot, having been pled in the alternative; and judgment having been rendered in the [Owners'] favor under the first and second causes of action." (*Id.*)

This Court finds that the gravamen of the entire Guaranty Case centered on proving one crucial fact—that the Guaranty is effective for 25 years. That is, in short, the central dispute involved whether the personal Guaranty is effective for the full 25-year term of the Lease (as the Owners claim) or for 10 years (as Kassab claims). Before the cases were consolidated, Judge Bennett explained in his February 2014 Order that "[t]he legitimacy of the third page, or rather the

disclosure of the third page, is the central issue in this litigation." (See Olsen Decl. Ex. I (Judge Bennett's February 9, 2014 Order, at 2)). Even Ms. Sand states that "[a]t its heart, the case involves a conflict over a two-page lease guaranty and a three-page lease guaranty with the essence of the case concerning the validity of the disputed third page." (Sand Decl. ¶ 26). Accordingly, in the Guaranty case, the Owners primarily sought equitable relief in the form of a declaratory judgment from the Court, declaring the duration of the Guaranty to be 25 years. In the alternative, if the Court did not grant declaratory relief, the Owners sought rescission of contract, and other legally recoverable damages for, in essence, breach of contract, fraud, and misrepresentation based upon the third-page of the Guaranty. Additionally, in the Lease Case, the Owners brought counterclaims based upon the same factual proof— that the Guaranty is effective for 25 years. And once Kassab successfully consolidated the Guaranty Case and Lease Case, Kassab inescapably made the third-page of the Guaranty the central issue in the entire case.

In sum, all claims for relief sought to provide a remedy to the purported third page of the Guaranty that purported to limit the duration of the Guaranty to 10 years. Whether the claim sounded in declaratory relief, breach of contract, fraud, or misrepresentation, the Owners sought relief based upon one issue—the effectiveness of the Guaranty. Consequently, these cases involved a "common core" of facts—the existence and legitimacy of third-page of the Guaranty.

Accordingly, this Court does not view the lawsuit as a series of discrete claims and the overall relief obtained was reasonable in relation to the hours reasonably expended on the litigation. In other words, this Court finds that the Owners prevailed on breach of contract and declaratory relief, which is inseparable from the issues presented in the Owners' alternative claims for relief. The fact that this Court did not reach certain alternative claims for relief does not prevent an award of attorneys' fees, costs, expenses, and disbursements.

Further, in the Lease Case, the Owners successfully dismissed all of Kassab's claims on summary judgment. And this Court finds that the Owners reasonably dismissed comparatively minor

counterclaims in the Lease Case to avoid continued and unnecessary litigation in light of the summary judgment ruling. (Supp. Olsen Decl. ¶ 11).

6. This Court Declines to Engage in an Hour-by-Hour Analysis

Kassab invites this Court to engage in an hour-by-hour analysis of the Owners' counsel's time entries. As support, Kassab points to Mr. Sand's declaration, which seeks to parse, hour-by-hour, the Owners' counsel's time entries. (Sand Decl. ¶ 13). This Court, however, declines to engage in an hour-by-hour analysis. Considering the sheer amount of time entries, such an hour-by-hour analysis would become an unduly burdensome exercise for the parties and this Court. *Progressive Animal Welfare Soc. v. Univ. of Washington*, 54 Wash. App. 180, 187, 773 P.2d 114, 118 (1989); *MKB Constructors v. Am. Zurich Ins. Co.*, 83 F. Supp. 3d 1078, 1090 (W.D. Wash. 2015) (citing *Progressive Animal Welfare Soc'y*, 54 Wash. App. at 773). Further, this Court agrees with Justice Talmadge's assessment that "I did not offer specific opinions on various line items in the fee invoices in my precisely because such a parsing of fees to the [Owners'] theories of recovery was entirely unnecessary." (Supp. Talmadge Decl. ¶ 5). This Court presided over the case, is intimately familiar with the procedural and substantive facts, pleadings, discovery, and motion practice. Accordingly, this Court is in a position to determine the reasonableness of attorneys' fees, expenses, costs, and disbursements without an explicit hour-by-hour analysis. *Chuong Van Pham v. City of Seattle, Seattle City Light*, 159 Wash. 2d 527, 540, 151 P.3d 976, 982 (2007).

As indicated above, this Court also does not consider Mr. Sand's testimony as helpful to the trier of fact in determining the reasonableness of the amount of attorneys' fees, expenses, costs, and disbursements. Although the hour-by-hour analysis is unnecessary under Washington law, the objections in Mr. Sand's declaration will nevertheless be addressed below, in turn.

a. The Owners' Redactions were Reasonable

Mr. Sand specifically complains that $257,000.25 in fees and costs should be reduced because certain time entries were not "sufficiently detailed," or were "redacted" and made it "impossible" to

determine whether the work "was reasonable and necessary related to prevailing in the case." Justice Talmadge, however, disagrees. (Sand Decl. ¶ 23). Highly experienced in attorney fee awards, Justice Talmadge states that "[i]n my opinion, the documentation of fees by the [Owners'] counsel is adequate." (Talmadge Decl. ¶ 7). Specifically, Mr. Talmadge stated that "[t]he time entries from the [Owners'] counsel both of the Zupancic Rathbone firm and the Holland Law Group . . . were contemporaneous time records," and that "[t]he time entries were meaningful and offer this Court sufficient information on the work that was actually performed by the referenced attorney or paralegal." (Talmadge Decl. ¶ 7). This Court agrees with the assessment of Justice Talmadge. *See also Beckman v. Wilcox*, 96 Wash. App. 355, 368, 979 P.2d 890, 897 (1999) (redacted time entries, used to protect confidential and privileged information, do not render the time records inadequate).

b. The Owners' Counsel Worked Efficiently and Avoided Duplicative Time.

Mr. Sand additionally argues that "the Owners employed two firms to represent them in this matter," and that "[i]n my opinion, there were too many examples of charges to the client for multiple lawyers to do the same task." (Sand Decl. ¶ 17). Mr. Sand, however, fails to provide examples or indicate where such entries entailed duplicative time. Instead, Mr. Sand expects the reader to review the entirety of the spreadsheet to locate the entries where Mr. Sand subjectively believes that multiple lawyers performed the same task. In essence, Mr. Sand provides nothing to support his opinion other than assurance that certain entries entailed duplicative work and that, in Mr. Sand's "opinion," the total cost of such duplicative hours is $86,024.00 and should arbitrarily be reduced 50% to $43,012.00. (Sand Decl. ¶ 17).

In contrast, Justice Talmadge stated that "it seems that the [Owners'] two firms were careful not to duplicate efforts," and, in fact, "[t]he association of Clark County counsel with an Oregon firm was sensible to enhance the [Owners'] chances of prevailing by having as part of the team a firm that was very familiar with Washington court rules and courthouse culture in Vancouver." (Talmadge Decl. ¶ 9). This Court agrees with Justice Talmadge's assessment. The Owners' Counsel, James J. Holland, explains that "[a] good portion of the motions and discovery practice was conducted by the

Zupancic Rathbone firm, in addition to much of the document discovery and depositions of third parties," in part, because "[o]ur firm could not have adequately handled or staffed a case requiring this much discovery and involving this many motions, facts, legal claims, witnesses and large amounts in controversy." (Holland Decl. ¶ 9). Justice Talmadge also noted that "the Holland Law Group exercised commendable billing judgment where James Holland, Sr. wrote off more than $80,000 in time." (Talmadge Decl. ¶ 9).

c. Administrative Time is Recoverable as Costs and Expenses

Mr. Sand attempts to argue that 417.35 hours in the Owners' fee petition were non-billable administrative time, which "should have been performed by a secretary or administrative assistant rather than a lawyer, paralegal, or other time-keeper." (Sand Decl. ¶ 15). Again, without reviewing all time entries in Mr. Sand's spreadsheet in detail, it is not clear which time entries Mr. Sand believes are administrative tasks. Instead, Mr. Sand argues that "[e]xamples include training time on a new software program or document management system," and tasks such as "copying, scanning, filing of documents, and saving of electronic documents." (Sand Decl. ¶ 15). As support, Mr. Sand attaches certain examples. Yet, the examples do not include examples of billing for scanning, filing of documents, and saving of electronic documents. Rather, the few examples that Mr. Sand provided relate to training with Epiq, an electronic discovery vendor, on document review. This Court, however, finds that such time was necessary to perform adequate document review, which was essential to the case. Contrary to Mr. Sand's characterization as administrative tasks, such attorney and paralegal time is not simply overhead.

And, in any event, this Court finds that administrative tasks are recoverable as "costs" and "expenses" under the Guaranty and Lease. *See, e.g.*, *William G. Hulbert, Jr. & Clare Mumford Hulbert Revocable Living Trust v. Port of Everett*, 159 Wash. App. 389, 409, 245 P.3d 779, 789 (2011). Here, the Guaranty similarly provides for recovery of "attorneys' fees, costs, and disbursements," and the Lease provided recovery for "all claims, liabilities, losses and expenses,

including legal fees." (Olsen Decl. Ex. Z). Consequently, even if the time entries are administrative tasks, this Court finds that such costs or expenses are recoverable under the Guaranty and Lease.

d. The Owners' Counsel Appropriately Delegated Certain Tasks to Paralegals.

Mr. Sand also argues that attorneys performed certain tasks that should have been performed by paralegals, such as "drafting discovery, document review, redaction, and other task that would be ultimately supervised, revised, or directed by an attorney." (Sand Decl. ¶ 20). Again, however, Mr. Sand expects the reader to review the entirety of the spreadsheet to locate the entries where Mr. Sand subjectively believes that attorneys performed alleged paralegal tasks. This is not reasonable. Furthermore, Mr. Sand's attack on time entries such as "address service...," "address subpoena issues," "address document production or issues," or "address document discovery," is unwarranted. (Sand Decl. ¶ 20). As elucidated throughout the Fee Petition, discovery in this case was a massive undertaking and attorneys must perform certain tasks, such as drafting subpoenas or addressing document review and production. Attorneys cannot delegate every task to paralegals, especially tasks which require legal analysis. Moreover, in contrast, Justice Talmadge did not question the use of paralegals and stated that "[t]he use of paralegals in this complex case was appropriate and the time spent was reasonable." (Talmadge Decl. ¶ 9). This Court agrees with Justice Talmadge's assessment.

e. Intra-office Communications Were Necessary

Mr. Sand argues that the Owners' Counsel spent approximately 30 hours on intra-office communications that should be reduced in the fee award. (Sand Decl. ¶ 19). Although Mr. Sand notes that intra-office communications "can be valuable and worthwhile in deciding strategy and delegating work," Mr. Sand argues that the narratives are not sufficient. (Sand Decl. ¶ 19). Yet, even then, Mr. Sand recognizes that the time entries appear to relate to brief discussions and answer questions regarding direction of a task. (Sand Decl. ¶ 19). Conferring amongst attorneys regarding brief discussions and providing directions on tasks are substantive legal work that are inevitable in

any case. Additionally, Mr. Sand cites no precedent to reduce the fee award for such time conferring with other attorneys. Beyond this, Mr. Sand again expects the reader to review the entirety of the spreadsheet to identify what entries Mr. Sand believes to be insufficient. This is not reasonable.

f. Procedural Legal Research is Necessary

Mr. Sand also argues that the Owners' counsel should have delegated procedural legal research to paralegals and legal assistants in the amount of 26 hours. (Sand Decl. ¶ 21). While paralegals and legal assistants can assist in performing such tasks, attorneys ultimately bear the responsibility of ensuring that the attorneys comply with procedural rules and timing. Consequently, attorney time spent to research procedural rules and timing is reasonable.

g. Costs for Copying, Depositions, Hand Delivery and Process Service, Subpoenas, and Legal Research Were Reasonable.

Mr. Sand additionally argues that certain costs and expenses were excessive. (Sand Decl. ¶ 25). Specifically, Mr. Sand argues that copying costs, deposition costs, hand delivery and process service fees, subpoena fees, and legal research were excessive. Due to the complex nature of the case, however, costs and expenses related to the foregoing items are inevitable and the Owners, in fact, incurred such costs and expenses to prevail on their claims. The litigation required, for example, numerous subpoenas, depositions, document requests, motions, and pleadings. Accordingly, costs will be commensurate with the size of the litigation and should come as no surprise.

7. Third-Party Attorney Fees are Recoverable and Reasonable

Kassab also argues that the Owners cannot recover attorneys' fees for attorneys that independently represented NAI Norris Beggs & Simpson, Coldwell Banker, and iQ Credit Union. Two of the foregoing entities are property managers, responsible for the management of the Gardner Center: NAI Norris Beggs & Simpson and Coldwell Banker. And, iQ Credit Union is the Owners' lender. Pursuant to indemnity agreements, the Owners were contractually obligated to reimburse such entities for their attorneys' fees and costs when such entities were subpoenaed to provide documents and/or testify at deposition. (*See* Supp. Olsen Decl. Exs. CC (Loan Agreement § 6.5

Indemnification), DD (Exclusive Property Management Agreement § 5.2 Hold Harmless), EE (Exclusive Property Management Agreement § 13 Indemnity)). Consequently, this Court finds that because Kassab subpoenaed and deposed such entities, the Owners incurred the expense of providing representation. Therefore, as between Kassab and the Owners, Kassab should bear the burden of such expense. Indeed, as indicated above, the Guaranty provides for recovery of "attorneys' fees, costs, and disbursements," and the Lease provided recovery for "all claims, liabilities, losses and expenses, including legal fees." (Olsen Decl. Ex. Z). The Guaranty and Lease do not limit recovery of attorneys' fees to those fees and costly solely incurred to represent the Owners. To the contrary, the Guaranty and Lease provide for recovery of all attorneys' fees and costs incurred throughout the litigation. Consequently, this Court finds that Kassab should bear the expense of providing representation to such entities. Further, this Court finds that the amount of third-party attorney fees is reasonable.

F. Alternatively, this Court Awards the Full Requested Attorneys' Fees, Costs, Expenses, and Disbursements Pursuant to RCW 4.84.185

The Owners alternatively request an award of attorneys' fees, costs, expenses, and disbursements pursuant to RCW 4.84.185 on the grounds that Kassab's claims and defenses in the Guaranty Case and Lease Case were frivolous and advanced without reasonable cause. RCW 4.84.185 provides the following:

> In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the non-prevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the non-prevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

RCW 4.84.185. The purpose of RCW 4.84.185 is to discourage abuse of the legal system by providing for an award of expenses and legal fees to any party forced to defend itself against meritless claims asserted for the purposes of harassment, delay, nuisance or spite. *Biggs v. Vail*, 119 Wash.2d 129, 134–36, 830 P.2d 350 (1992). The statute is also designed to discourage frivolous lawsuits and to compensate the targets of frivolous lawsuits for their fees and costs incurred in defending meritless cases. *Kearney v. Kearney*, 95 Wash. App. 405, 416, 974 P.2d 872 (1999); *Timson v. Pierce Cnty. Fire Dist. No. 15*, 136 Wn. App. 376, 386, 149 P.3d 427, 432 (2006), *as amended* (Jan. 17, 2007); *See also, Housing Authority of City of Everett v. Kirby*, 154 Wn. App. 842 (2010) *review denied* (Statutory provision allowing for attorney fees to prevailing party for opposing frivolous action was designed to discourage abuses of the legal system by providing for an award of expenses and legal fees to any party forced to defend against meritless claims advanced for harassment, delay, nuisance, or spite).

Kassab argues that "[t]he RCW 4.84.185 motion is redundant of the motion for an award of fees and expenses, as the remedy sought is exactly the same in each motion." (Opposition, at 21). This Court disagrees. As Justice Talmadge explains, RCW 4.84.185 provides another, alternative, basis to award fees and costs. (Supp. Talmadge Decl. ¶ 6). Moreover, there is an important difference between a motion for award of fees and costs based upon contract and an RCW 4.84.185 motion. Unlike an award based upon contract, RCW 4.84.185 is not subject to the lodestar analysis. In other words, as Justice Talmadge explains, under RCW 4.84.185, "[t]he Court may award the full requested fee and is not bound necessarily by the lodestar method." (Supp. Talmadge Decl. ¶ 6). Indeed, in *Racy*, the Court of Appeals held that "[w]e find no authority for the proposition that the trial court had to use a lodestar analysis under RCW 4.84.185," and "[t]he amount and methodology for imposing sanctions was left to the trial court." *Highland Sch. Dist. No. 203 v. Racy*, 149 Wash. App. 307, 314, 202 P.3d 1024, 1028 (2009). This is because the policy behind RCW 4.84.185 is "to compensate those parties forced to defend against a frivolous claim or defense." *Racy*, 149 Wash. App. at 316, 202 P.3d at 1029. Consequently, the RCW 4.84.185 is not "redundant," but is in

addition to the Owners' motion based upon the Guaranty and Lease. Indeed, RCW 4.84.185 is meant to prevent abuse of the legal system and prevent litigants from asserting frivolous claims and defenses that—as in this case—result in enormous financial burdens. *Biggs v. Vail*, 119 Wash. 2d 129, 134–36, 830 P.2d 350 (1992).

Nevertheless, Kassab cites *Tiger Oil*, and argues that, before a court can award attorneys' fees and costs under RCW 4.84.185, the claims and defenses must be frivolous in their entirety. *Tiger Oil Corp. v. Dep't of Licensing, State of Wash.*, 88 Wash. App. 925, 938, 946 P.2d 1235, 1241 (1997). Kassab argues that the certain defenses in Guaranty Case and claims in the Lease Case were asserted with reasonable cause. (Opposition, at 21-22). As indicated above, however, this Court finds that the gravamen of the entire action in both the Guaranty Case and Lease Case involved the third-page of the Guaranty. Every claim and defense was specifically intertwined and connected with the legitimacy of the third-page of the Guaranty. And once Kassab successfully consolidated the Guaranty Case and Lease Case, Kassab inescapably made the third-page of the Guaranty the central issue in the entire case. Although before the cases were consolidated, Judge Bennett explained in his February 2014 Order that "[t]he legitimacy of the third page, or rather the disclosure of the third page, is the central issue in this litigation." (*See* Olsen Decl. Ex. I (Judge Bennett's February 9, 2014 Order, at 2)). This Court agrees with Judge Bennett's assessment.

Kassab also suggests that the Owners have not established a lack of good-faith belief in the genuineness of the third-page of the Guaranty. Despite Kassab's insistence, however, the two-page version shows up in nearly every authenticated document, including Kassab's own files on multiple occasions. And yet, when confronted with his own file documenting a two-page unlimited personal guaranty as well as two forensic document experts who concluded the third-page was a forgery, Kassab continued to advance his position regarding the third-page of the Guaranty. As explained above, the factual evidence includes numerous examples that the third-page is a cut and paste fabrication meant to defraud the Owners.

Additionally, Judge Bennett noted in his order regarding the crime-fraud exception to the attorney-client privilege that the Owners have made "[a] very strong showing of fraud." (*See* Ruling and Order on Walker Group's Motion for In Camera Review of Privileged Materials and Communications, at 8). This Court again agrees with Judge Bennett's assessment. The only "evidence" that the "third page" to the guaranty even *existed* prior to 2012 is Kassab's own self-serving assertions and the speculative and biased testimony of Brooke Pool.

Accordingly, to make the Owners whole again in light of the strong showing of fraud, pursuant to RCW 4.84.185, this Court alternatively awards the full amount of the requested attorneys' fees, costs, expenses and disbursements of $1,804,949.61.

IT IS SO ORDERED:

Dated this 17th day of March, 2016.

Judge Suzan L. Clark

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

BATTLE GROUND CINEMA, LLC, a Washington limited liability company,

Plaintiff/Appellant,

v.

ROBERT BERNHARDT and KAREN BERNHARDT, a married couple; CHARLES MULLIGAN, an individual; SAMUEL WALKER and SHELLEY WALKER, as Trustees of the WALKER FAMILY TRUST, a California trust; CHRISTOPHER WALKER and LARA EVANS-WALKER, a married couple; and SAMUEL WALKER, as Trustee of the JTW TRUST, a California trust,

Defendants/Respondents.

SAMUEL WALKER AND SHELLEY WALKER, as trustees of the WALKER FAMILY TRUST, a California trust; CHRISTOPHER AND LAURA EVANS-WALKER, a married couple; JOSEPH WALKER, as trustee of the JTW TRUST, a California trust; ROBERT AND KAREN BERNHARDT, a married couple; and CHARLES MULLIGAN, an individual,

Plaintiffs/Appellants,

v.

ELIE G. KASSAB, an individual; THE GARDNER CENTER LLC, a Washington limited liability company; and BATTLE GROUND CINEMA LLC, a Washington limited liability company,

Defendants/Respondents.

COA No. 47718-1-II

Superior Court No. 12-2-04501-5

CERTIFICATE OF SERVICE

Superior Court No. 12-2-04713-1

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